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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. .....

OTTER TAIL POWER COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (A—1-21) [1] is officially reported at 331 F. Supp. 54.

[1] References to the Appendix are given in the following form: Page 1 of the Appendix is referred to as "A—1", etc.

JURISDICTION

The district court entered Findings of Fact and Conclusions of Law (A—22-107) and its original Judgment (A—108-111) on October 22, 1971. On October 28, 1971, appellant moved, *inter alia*, to amend such Judgment, and an amended, final Judgment (A—114-117) was accordingly entered on November 10, 1971. Appellant's motion was otherwise denied (A—112, 113). Notice of Appeal was filed in the District of Minnesota, Sixth Division, on December 7, 1971. (A—118-119). The district court's Amended Judgment has been suspended during the pendency of this appeal. (See Order suspending injunction, dated Dec. 7, 1971, in the Record). The jurisdiction of this Court is conferred by the Expediting Act § 2, 15 U.S.C. § 29, *formerly* 32 Stat. 823 (1903). *See, e.g., White Motor Co. v. United States*, 372 U.S. 253, 256 (1963); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

STATUTES INVOLVED

The Sherman Act § 2, 15 U.S.C. § 2, *formerly* 26 Stat. 209 (1890), provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . ."

Although the district court failed to consider the application of Part II of the Federal Power Act, 16 U.S.C. §§ 824-824h, *formerly* 49 Stat. 847 (1935), appellant is an electric utility company regulated under that statute, and the following parts

of Section 202, 16 U.S.C. § 824a, apply directly to the conduct here in question:

"(a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the [Federal Power] Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, . . . It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts.

* * *

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, that the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of

the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due any of them."

QUESTIONS PRESENTED

1. Does Section 2 of the Sherman Act require a federally regulated electric utility to establish physical connection of its transmission facilities with each and every person who requests such service, and to sell or exchange energy at wholesale with such persons upon demand, without the necessity of any Federal Power Commission orders and regardless of the criteria specified in Section 202(b) of the Federal Power Act?

2. Does Section 2 of the Sherman Act require a federally regulated electric utility to transmit ("wheel") its competitors' power over its own transmission lines, even though Congress, in enacting Part II of the Federal Power Act, specifically determined that this duty should not be imposed on such uilities?

3. Are voluntary interconnection and coordination arrangements of the kind encouraged by Section 202(a) of the Federal Power Act illegal *per se* under the antitrust laws where the parties agree that each one's lines may be used for certain purposes, but not for the transmission of competing energy to its own existing customers?

4. Was the district court correct in holding that appellant is a monopolist, and that Section 2 of the Sherman Act therefore applies in its full rigor, regardless of the special circumstances of the electric utility industry, the nature, purposes

and policy of the pertinent regulatory scheme, and the practical effects of such holding on appellant's customers in terms of rates and quality of service?

5. Does Section 2 of the Sherman Act preclude an electric utility from exercising its constitutional right to seek judicial redress to challenge the legality of action taken to oust it from a particular municipality?

6. Was the district court correct in admitting over appellant's objection evidence as to appellant's participation in political campaigns, and in considering such evidence in arriving at its conclusion that appellant was guilty of unlawful monopolization?

7. Is the district court's judgment, which effectively requires appellant to promote the destruction of its own business, constitutionally valid as a matter of due process?

STATEMENT

1. Otter Tail's Business and Service Area

The Otter Tail Power Company ("Otter Tail") is in the business of supplying electricity at retail to consumers in western Minnesota, eastern North Dakota and northeastern South Dakota. A—4. Otter Tail serves a total of 465 towns, 440 of which have populations of less than 1,500.[2] A—4, DX 95, sch. 4. By painstaking effort over a period of more than 60

[2] Only three of the towns in Otter Tail's service area have populations of more than 10,000. The largest has a population of approximately 15,000. R. VI, 125.

years, Otter Tail has created an integrated electric power system capable of furnishing economic and reliable service to this thinly populated part of rural America. R. VI, 120-127.[3]

Under applicable state law, Otter Tail generally operates pursuant to municipal franchises which expire every 10 or 20 years. A—4, 5. Since the 1940's there have been municipal power factions in various towns which have advocated in each case that the town in question opt out of the Otter Tail system and establish its own, independent power system. A—2. The issue of municipal versus private power has been resolved at the polls in each instance. Of the six towns which the district court dealt with in any detail,[4] three voted for—and presently have—municipal electric companies,[5] while three elected to remain with Otter Tail.[6]

2. Interconnection and Wheeling

The district court stated that the "basic issue" in this case is whether Otter Tail's refusal "to sell electric power at wholesale, and . . . to wheel [or transmit] electric power to municipalities it formerly served at retail, constitute a monopoliza-

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[3] Transcript references are given in the following form: Volume I, page 1 of the Transcript is referred to as: "R. I. 1," etc.

[4] The towns of Aurora, Colman, Elbow Lake, Hankinson, Finley and Velva are all dealt with in the district court's Findings. A—25-61. The district court's opinion, however, considers only the first five of these municipalities A—11, 12.

[5] Aurora, Colman and Elbow Lake. A—25, 34, 47, 48, 53, 54, 59. GX 84, Stips. 6, 10, 11, 39, 43, 44, 45, 54, 58, 59, 60. R. VI, 58.

[6] Hankinson, Finley and Velva. A—46, 60, 61. GX 84, Stips. 28, 29, 69. The district court's findings refer to six additional towns where the electorate decided against municipal power, three towns which switched from Otter Tail to rural electric cooperatives without holding a referendum, and three towns which went out of existence. A—61, 62.

tion of commerce in violation of the [Sherman] Act." A—1. In fact, this issue relates to only two towns—Elbow Lake and Hankinson. None of the other municipalities considered below requested that Otter Tail interconnect or wheel; indeed none had any need for such services since alternative transmission facilities were readily available in each instance.

Elbow Lake, Minnesota (pop. 1,550), elected not to renew Otter Tail's franchise when it expired in 1960. A—27. Otter Tail nevertheless continued to serve Elbow Lake until that municipality's own generating and distribution system began operations in June, 1966. GX 84, Stips. 10, 11. While the municipal power project was in its preparatory stages, Elbow Lake requested that Otter Tail support its efforts by furnishing electricity at wholesale or, in the alternative, that Otter Tail allow its transmission lines to be used to wheel subsidized, governmentally produced power to its former retail customers. A—11, 28, 29, 33. Otter Tail refused both requests on the ground, among others, that such support for municipal power ventures would lead to the erosion and eventual destruction of its own integrated system. A—6. R. VII, 47-55.

In March, 1966 (some three months before its system became operational), Elbow Lake filed an application with the Federal Power Commission to compel Otter Tail to furnish the services which it had previously requested. A—34. GX 84, Stip. 13. On November 6, 1968, the FPC entered an order pursuant to Section 202(b) of the Federal Power Act, requiring Otter Tail to provide a short term interconnection and to sell electricity at wholesale as an emergency measure, in order to prevent overloading of Elbow Lake's generators.[7]

In a second opinion dated September 13, 1971 (A—136-153),

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[7] A—120-135, 40 FPC 1262 (1968), *aff'd*, 429 F. 2d 232 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971).

the FPC ruled that a long-term interconnection also would be in the public interest in Elbow Lake's case. A—137.[8] The Commission made it clear, however, that it did not wish to encourage "improvident ventures" by other municipalities. A—141. It pointed out that Elbow Lake, while perpetuating Otter Tail's rates, had nevertheless incurred a financial loss, and that the new municipal system was of "doubtful reliability." A—140. The FPC also found "that Otter Tail is legitimately concerned about the possible erosion of its system." It thus stated:

> "If other communities were to follow Elbow Lake's route, and if, having miscalculated the results, they could expect to be rescued by overly generous interconnection terms, then Otter Tail's fears that it will lose its customers, seriatim, seem to us to be supported." A—141.

The FPC therefore formulated an order designed to provide assistance in the immediate case, but upon terms which would be "fair to Otter Tail and its customers" and would not encourage other municipalities to follow suit.

Hankinson, North Dakota (pop. 1,125) voted to establish a municipal electric system in October, 1963. A—38. Like Elbow Lake, Hankinson asked Otter Tail to supply electricity at wholesale and to wheel government power. A—12, 38, 39. Otter Tail did not comply with these demands, and Hankinson accordingly applied to the FPC in 1966 for an order compelling Otter Tail to render such services. GX 132. A—44.

In 1968 the composition of the Hankinson City Council changed with the election of a new mayor and councilmen opposed to municipal power. R. VII, 80. R. II, 59, 60. As a result, the Council elected to terminate the FPC proceeding and

[8] The FPC also ruled that it had no power to compel wheeling. See pp. 21, 22, *infra*.

to offer a new franchise to Otter Tail. GX 84, Stips. 28, 29. A—45, 46. R. VI, 58. GX 311, p. 36-42. The city thus chose voluntarily not to pursue its Federal Power Act remedies as Elbow Lake had done.

In summary, the district court's finding of monopolization rests upon Otter Tail's refusal to interconnect or wheel electricity to two towns. One of these (Elbow Lake) has been operating its own municipal power system since 1966, while the other (Hankinson) switched its preference from municipal to private power through the electoral process. It may also be noted that Elbow Lake supported its municipal power venture by obtaining through proper administrative procedures the very relief which the instant antitrust action was intended to afford.

3. Litigation

Aside from Elbow Lake and Hankinson, the proceedings below concentrated on the towns of Colman and Aurora, South Dakota (pop. 505 and 232, respectively). Since both of these municipalities had ready access to Bureau of Reclamation power (A—53, 59. GX 84, Stips. 36, 37, 44, 52, 53, 59.), the district court found that Otter Tail had "monopolized" here by instituting litigation rather than by refusing to interconnect or wheel. A—16, 48-52, 55-59. Otter Tail did bring a suit against Colman which unsuccessfully challenged certain procedures adopted by that town in establishing its municipal power system. A—49. In the case of Aurora, however, a suit brought by Otter Tail and several town residents was successful on the merits, and judgment was awarded in favor of the co-plaintiffs, although Otter Tail's own claim was dismissed for lack of standing. A—57. GX 192, 193. Neither litigation

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prevented the municipality in question from establishing its own, independent power company.[9] Colman has had municipal power since 1965, and Aurora's system has been operating since 1968. A—53, 59.

Otter Tail also brought or supported court actions against Elbow Lake and Hankinson. Its suits against Elbow Lake were unsuccessful, and in any event did not prevent that municipality from establishing its power system. A—31, 32, 34.[10] In the case of Hankinson, Otter Tail supported a suit by local taxpayers which was successful at the trial court level, although the decision was reversed on appeal. A—44, 45.

The evidence at trial was uncontroverted that Otter Tail's decision to sue in each of the above cases was based upon its appraisal of the merits rather than upon any general policy to litigate in every instance. R. VII, 74-78. Dep. GX 287, p. 283, 284. While the district court found that these suits had been brought to prevent the establishment of municipal power systems, it did not find that they were frivolous actions or brought in bad faith. A—16.

4. Other Acts

The only other towns which the district court examined in any detail in its Findings are Finley and Velva, North Dakota (pop. 809 and 1,241, respectively). A—59, 60, 61. In these cases, Otter Tail neither instituted litigation nor refused to interconnect or wheel electricity. Both towns simply voted against municipal power. All that Otter Tail was found to

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[9] In the Aurora suit, the court held that the town could not bid for the purchase of its own revenue bonds as it had proposed. The town was subsequently able to sell its revenue bonds lawfully, i.e., to independent buyers. A—57.

[10] It should be noted that Elbow Lake in turn sued Otter Tail, and that Otter Tail prevailed at both the trial and appellate levels. DX 47-DX50. See 281 Minn. 43, 160 N.W. 2d 571 (1968).

have done was to take action to improve service in both municipalities. A—60, 61.

With respect to some of the other towns referred to above, the district court also considered evidence that Otter Tail had sought to influence local elections by circulating statements opposed to municipal power and by otherwise supporting groups who wished to maintain Otter Tail's franchise. A—6, 28, 32, 50, 51, 58.

In summary, of the six towns which the district court considered in any detail, three opted for, and now have municipal power (Elbow Lake, Colman and Aurora). Of the three which elected to remain with Otter Tail (Hankinson, Finley and Velva), two (Finley and Velva) are towns in which Otter Tail is accused of nothing more than having improved its service, and in the third (Hankinson) the electorate voted the municipal power faction out of control.

5. Voluntary Interconnection and Coordination Arrangements

In 1955, Otter Tail entered into a contract with the United States Bureau of Reclamation whereby, upon specified terms and conditions, each party agreed to sell and exchange power and to provide wheeling services for the other. GX 67, A—5, 9, 17, 104, 105. Among other things, Otter Tail agreed to transmit power to Bureau customers other than those located in municipalities which Otter Tail was itself serving at retail. GX 67, par. 27(c), p. 27, 28. A—9, 105. Otter Tail has entered into substantially similar contracts with various rural electric cooperatives. GX 22, 38, 39. A—17, 106. In each case, the duty of Otter Tail and of the contracting cooperative to transmit

power for the other is subject to the same kind of restriction. A—17, 106.

Although the district court made no finding on the point, evidence adduced at trial showed that the aforesaid contracts would not have been entered into without the provisions assuring the parties that their facilities could not be used to deprive them of existing customers. R. VII, 10-19, 27-36. While such voluntary interconnection and coordination arrangements plainly serve to assure "an abundant supply of electric energy . . . with the greatest possible economy and with regard to the proper utilization and conservation of natural resources. . . .", Federal Power Act § 202(a), the district court invalidated all of these contracts without consideration of Federal Power Act goals. A—115, 116.

6. Proceedings Below

The government's Complaint, filed July 14, 1969, alleged that Otter Tail had monopolized and attempted to monopolize by (1) refusing and threatening to refuse to sell power at wholesale, (2) refusing and threatening to refuse to wheel and (3) "engaging in other activities designed to obstruct and defeat the attempt by municipalities to establish alternative local electric power system [sic]." A—2, 3. In its Answer, Otter Tail admitted its refusal to sell at wholesale and wheel, but denied that such conduct violated Section 2 of the Sherman Act. A—3.

The case was tried on June 1 through June 14, 1971. A—3. Many of the operative facts were established by stipulation. A—3. The district court rendered its opinion on September 9, 1971, and entered its original judgment on October 22, 1971. Without considering the application of the Federal Power Act, it held that Otter Tail's refusal to sell at wholesale and wheel

constituted monopolization (A—1-14, 108, 109); Otter Tail was accordingly enjoined from refusing such services to existing or proposed municipal power systems in the future. A—109, 110. The court also found that litigation initiated or sponsored by Otter Tail had violated Section 2 (A—14-16), and it enjoined Otter Tail from thereafter engaging in any litigation "for the purpose of delaying, preventing or interfering with establishment [sic] of a municipal electric power system." A—109. Finally, the district court found that Otter Tail's contracts with the Bureau of Reclamation and various rural electric cooperatives were illegal *per se* because the parties did not undertake to wheel power to their own retail customers. A—17-19. The Judgment accordingly prohibited Otter Tail from entering into or enforcing any such agreements. A—109, 110.

On October 27, 1971, Otter Tail moved for a new trial or, in the alternative, for amended and/or additional findings of fact and conclusions of law, and to amend the Judgment. (See Alternative Motions which are included in the Record.) Among other things, Otter Tail brought to the court's attention the Federal Power Commission's decision of September 13, 1971 which had granted Elbow Lake a long term interconnection. The district court amended its Judgment on November 10, 1971 by adding the proviso that Otter Tail would not be compelled "to furnish wholesale electric service or wheeling service except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission." A—116. The amended Judgment did not, however, allow the FPC any discretion as to the threshold question of whether the public interest required that wholesale or wheeling service be compelled at all in a given case.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents several questions of first impression as to the continued viability of important aspects of federal utility regulation. If the decision below is permitted to stand, it will significantly impair the ability of the utility industry to meet the nation's expanding need for power in coming years. The issues are thus of the utmost importance for American utilities and their customers, as well as for the regulated sector of our economy in general.

1. The district court has held that the obligation of electric utilities to furnish wholesale service to competitors is an absolute duty imposed by the antitrust laws, rather than a matter to be determined on a case by case basis by the Federal Power Commission under Section 202(b). This ruling marks a dramatic departure from the principle of primary jurisdiction first established by this Court in *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). In that case, the Court dismissed a common law claim predicated upon the exaction of allegedly excessive railroad rates, on the ground that "the power of the [Interstate Commerce] Commission would . . . extend to hearing legal complaints of and awarding reparation to individuals for [such] wrongs . . ." *Id.* at 442. In other words, where an adequate administrative remedy exists in a regulated industry, it may not be by-passed by resort to remedies that would otherwise be available in the courts.

In *United States Nav. Co. v. Cunard Steamship Co. Ltd.*, 284 U.S. 474 (1932), the defendant companies offered special reduced rates to shippers who agreed to deal only with members of the combination. The court affirmed the dismissal of the plaintiff's Clayton Act complaint as follows:

> ". . . the allegations either constitute direct and basic charges of violations of . . . [the Shipping Act] or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws . . . . The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board." (at 485)

In *Far East Conference v. United States*, 342 U.S. 570 (1952), which involved substantially the same practice, the *Cunard* ruling was held to apply equally to an antitrust suit brought by the government as distinguished from a private plaintiff. Similarly, in *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963), the Civil Aeronautics Board's statutory jurisdiction over "unfair practices" and "unfair methods of competition" was held to require dismissal of the government's antitrust complaint.

In those cases where antitrust has been applied to regulated industries, on the other hand, the Court has generally stressed the administrative agency's lack of authority over the conduct in question. Thus, in *Georgia v. Pennsylvania R. R. Co.*, 324 U.S. 439, 455-56 (1945), the Court said:

> "[Georgia] asks that the alleged rate-fixing combination and conspiracy among the defendant-carriers be enjoined. As we shall see, that is a matter over which the [Interstate Commerce] Commission has no jurisdiction . . . . [Congress] has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities."

Significantly, in *Pan American* the Court distinguished *Georgia* on precisely this basis; that is, on the ground that the CAB did have the regulatory power which the ICC lacked in the earlier case. See 371 U.S. at 305-306. *See also, Silver v. New York Stock Exchange*, 373 U.S. 341, 358 (1963) ("Moreover, the [Securities and Exchange] Commission's lack of jurisdiction over particular applications of exchange rules means that the question of antitrust exemption does not involve any problem of conflict or coextensiveness of coverage with the agency's regulatory power.")

In the instant case, Congress has plainly and unambiguously vested the Federal Power Commission with authority and discretion to determine whether a mandatory interconnection should be ordered. See Federal Power Act § 202(b). Indeed, the Commission has actually exercised such authority with respect to Elbow Lake and a similar application was pending before the FPC with respect to Hankinson when that municipality voluntarily terminated the administrative proceeding. The judgment below, which requires Otter Tail to interconnect in all cases without any prior administrative determination, thus constitutes the most blatant possible invasion of the FPC's primary jurisdiction.

This Court recently upheld an FPC mandatory interconnection order (which had been partially reversed by the Court of Appeals) in *Gainesville Utilities Department v. Florida Power Corp.*, 402 U.S. 515 (1971). The Court described the pertinent statutory provisions as follows:

> "Section 202(b) authorized the Federal Power Commission to order a utility to interconnect with another, and to 'prescribe the terms and conditions of the arrangement . . .,' *if* the Commission 'finds such action necessary or appropriate in the public interest,' and '*if* the

> Commission finds that no undue burden will be placed upon such public utility thereby.' The proviso to the section makes explicit that the Commission has no authority in ordering an interconnection 'to compel the enlargement of generating facilities . . . [or] to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. 16 U.S.C. § 824a(b)" (at 521-522; emphasis added).

The ruling below plainly makes a shambles of this regulatory scheme. While the statute authorizes interconnection "[u]nder certain circumstances," *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 423 (1952), the district court's judgment requires Otter Tail to interconnect in all cases, regardless of whether or not it may be "necessary or appropriate in the public interest." Indeed, contrary to Congress' expressed intent, Otter Tail must even furnish such service where it will impose an undue burden, compel the enlargement of facilities or impair Otter Tail's ability to render adequate service to its customers.

The judgment below also disregards the FPC's specialized expertise in the electric utility field—a consideration which is basic to the doctrine of primary jurisdiction and to Congress' intent in enacting the Federal Power Act. Thus, this Court stated the following with respect to that portion of the Section 202(b) order which the Fifth Circuit had reversed in *Gainesville:*

> "Congress ordained that that determination should be made, in the first instance, by the Commission, and on the record made in this case, the Court of Appeals erred in not deferring to the Commission's expert judgment." *Id.* at 527.[11]

[11] *See also, FPC v. Florida Power & Light Co.*, 40 United States Law Week 4141, 4144-45 (January 12, 1972).

Far from deferring to the FPC, the district court has stripped that agency of its statutory authority to determine whether a mandatory interconnection will be ordered or not. The proviso in the Amended Judgment allowing the FPC to regulate rates and other terms in connection with Otter Tail's now unconditional obligation to sell at wholesale, highlights rather than cures the court's fundamental error. As this Court stated in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951):

> "Petitioner cannot separate what Congress has joined together. *It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion*" (emphasis added).

In the instant case, the lower court has sought to separate the FPC's power to determine the terms of an interconnection from its essential authority to decide whether such interconnection is in the public interest or may be in the public interest if certain conditions are met. Instead of enforcing the statute, the FPC must henceforth enforce the court's decree. As a result, the public has been deprived of the whole value of having Commission expertise brought to bear at the outset and with respect to the most crucial issues in a Section 202(b) proceeding.

In *Pan American*, Justice Douglas warned that "[i]f the courts were to intrude independently [upon an agency's primary jurisdiction] with their [own] construction of the antitrust laws, two regimes might collide" *Id.* at 310. That is precisely what has happened here. In its September 13, 1971

order, the FPC stressed the importance of not encouraging other municipalities to follow Elbow Lake with improvident power ventures of their own. A—140-143. The district court, on the other hand, has in effect declared it a misdemeanor for a utility to oppose such ventures or, for that matter, to fail to support them by selling at wholesale and wheeling. A—106, 107, 114-117. In its earlier interconnection order, the FPC declared Otter Tail's viability as a producer of electricity to be an element of the public interest. A—131. For the district court, however, Otter Tail's survival is utterly immaterial to a determination of whether mandatory interconnection is required. A—6, 7, 19-21, 106, 107.

In sum, the district court erred in ignoring the application of the Federal Power Act and in misconstruing the Sherman Law so as to utterly nullify the regulatory scheme which Congress provided.

2. The ruling below requiring Otter Tail to wheel power on demand for third parties in effect converts electric utilities into common carriers of energy. This aspect of the decision is, if anything, even more directly in conflict with Congress' will than that discussed above, for here Congress specifically decided that no duty—conditional or otherwise—should be imposed.

While the original proposed version of Part II of the Federal Power Act did authorize the FPC to compel wheeling under certain circumstances, this provision was taken out of the final draft. The Senate Committee Report states:

> ". . . the provisions of the old Sec. 203(b) empowering the Federal Power Commission to require one utility to permit the use of its facilities by another . . . have been eliminated; these matters are left to the voluntary action of the utilities." S. Rep. No. 621, 74th Cong., 1st Sess. 19.

The reason for this change was spelled out as follows by Senator Wheeler, who sponsored the bill:

> ". . . there was a provision in the bill making transmission lines common carriers. This was stricken out, I may say, at my suggestion, because I did not think that at present transmission lines should be held to be common carriers." 79 Cong. Rec. 8750 (1935).

See also the following testimony of FPC Commissioner Seavey before the House Committee, which was quoted by this Court as an indication of legislative intent in *United States v. Public Utilities Commission of California*, 345 U.S. 295, 313-14 n. 23 (1953):

> "Mr. Pettengill. Mr. Commissioner, you just said a moment ago that as you construed the bill, a private power line could not be required to carry electric energy generated by the Tennessee Valley Authority or a municipal plant owned by a city, or a State; is that correct?
>
> "Commissioner Seavey. Yes; that is my understanding of the bill." [12]

The testimony of Mr. DeVane, Solicitor for the FPC, confirms that the power to compel wheeling was withheld deliberately, as a matter of policy:

> "Mr. Wolverton. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private companies?
>
> "Mr. DeVane. No sir; and I want to make that very definite; and if there is any doubt about it, so far as I am

[12] See also, Hearings on H. R. 5423 Before the House Committee on Interstate and Foreign Commerce 74th Cong., 1st Sess. 395.

concerned, such amendment might be made as to make it clear.

* * *

"Mr. Wolverton. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance: Assume that a municipality built a plant for the generation and distribution of electric energy. Assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. *Could the city which has constructed a plant, but has no transmission lines, utilize the system of transmission lines, constructed by the private company?*

"Mr. DeVane. *'No sir.'* " House Hearings, p. 514 (emphasis added).

In other words, Congress specifically considered as a hypothetical the very fact situation involved in the instant case, and determined that no duty to wheel should be imposed in such circumstances.

Based upon the above-cited legislative history, the FPC has held that it has no power to "compel a private utility to transmit the power of government instrumentalities under Part II of the [Federal Power Act]." *City of Paris, Kentucky v. Kentucky Utilities Co.*, 41 FPC 45 (1969). See also *Village of Elbow Lake, Minnesota v. Otter Tail Power Co.*, —— FPC —— (1971) (A—143). This Court has traditionally allotted great weight to such "established administrative interpretations." *United States v. Public Utilities Commission of California*, 345 U.S. 295, 315 (1953). The FPC's view has been adopted by the Fifth Circuit in *Florida Power Corp. v. FPC*,

425 F. 2d 1196, 1202-03 (5th Cir. 1970), *aff'd. on this point sub. nom. Gainesville Utilities Department v. Florida Power Corp., supra,* and by the Eighth Circuit in *Otter Tail Power Co. v. FPC,* 429 F. 2d 232, 235 (8th Cir. 1970), cert. denied, 401 U.S. 947 (1971).

The judgment below purports to reverse this Congressional determination. Indeed, it makes the duty which Congress refused to impose 37 years ago an absolute one, applicable to every case regardless of the circumstances. Again, the provision in the Amended Judgment allowing the FPC to fix rates and other terms for compulsory wheeling, highlights the court's error—especially since that agency has no statutory authority to make such determinations in this regard. As this Court stated in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246, 254 (1951):

> "The fact that the Congress withheld from the [Federal Power] Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent."

Under the district court's construction of the Sherman Act, the proceedings in the 74th Congress were nothing more than an exercise in futility. Under its view, the provision as to compulsory wheeling in the original draft of Part II of the Federal Power Act was unnecessary—an absolute duty to wheel having existed since 1890—and the elimination of that provision was totally without effect. Any such interpretation of Congress' acts is plainly incorrect and should be reversed.

3. The district court ruled that Otter Tail's contracts with the Bureau of Reclamation and with various rural electric

cooperatives are illegal *per se* because of the parties' agreement to allow their transmission lines to be used for certain purposes, but not for the transmission of competing energy to their existing customers. This holding is erroneous on several grounds.

As a matter of substantive antitrust law, the district court erred in assuming without analysis that such arrangements constitute agreements "to allocate customers or territories." In fact, no party was contractually foreclosed from selling to the other's customers. *Cf. United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).[13] Rather, each party voluntarily allowed the other the use of its facilities, subject to the reasonable condition that those facilities not be used to destroy its business. Both parties remained free to build their own transmission lines so as to compete in each other's territory.

It is a well settled principle of the common law, which was codified by the Sherman Act (*Apex Hosiery Co. v. Leader*, 310 U.S. 469, 498 (1940); *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911); *Addyston Pipe & Steel Co. v. United States*, 85 F. 271, 279, 281-82 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)), that a covenant by a lessee not to use the leased premises to compete with the lessor, is not an unreasonable restraint of trade. See Restatement of Contracts § 516 (1932); 6A CORBIN ON CONTRACTS § 1389 (1962); 5 WILLISTON ON CONTRACTS § 1642 (Rev. ed. 1937).[14]

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[13] In *Montana-Dakota Utilities Co. v. Williams Electric Cooperative*, 263 F. 2d 431 (8th Cir. 1959), relied on by the district court, the parties actually agreed to divide a particular sales territory, each binding itself not to solicit customers in the other's assigned area.

[14] A covenant not to compete on the part of the lessor similarly does not constitute an unreasonable restraint. *Export Liquor Sales, Inc. v. Ammex Warehouse Co.*, 426 F. 2d 251 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); Annot., 97 A.L.R. 2d 4, 14 (1964).

A similar restriction incident to the use of transmission wires is therefore likewise not an unreasonable restraint, and certainly cannot be presumed to be unreasonable *per se*.

The district court further erred in failing to give any consideration whatsoever to the provisions and policies of the Federal Power Act bearing directly on the contracts in question. Section 202(a) of that statute specifies that it shall be the "duty" of the FPC "to promote and encourage" agreements for the "voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy. . . ." Nothing could be calculated to discourage more effectively the voluntary coordination of transmission facilities (i.e., wheeling) than the ruling below to the effect that if a utility undertakes to wheel at all, it must also agree to wheel competing power to its own retail customers. In *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 309 (1963), Justice Douglas stated with respect to the Federal Aviation Act:

> "It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations."

In the instant case, the district court, by its Amended Judgment,[15] has invalidated in their entirety the interconnection agreements entered into by Otter Tail with the Bureau of Reclamation and various rural electric cooperatives—the very kinds of agreements which Congress has expressly stated to

[15] Paragraph IV(D) of the Amended Judgment provides that Otter Tail is enjoined and restrained from: "Entering into, enforcing or claiming any rights under any contract, agreement or understanding which prohibits the use of Otter Tail's transmission lines to wheel (transmit) electric power from other electric power suppliers to existing or proposed municipal electric power systems".

be in the public interest. *Cf. Federal Power Commission v. Florida Power & Light Co.*, 40 United States Law Week 4141, 4148 (January 12, 1972) (dissenting opinion). The decision directly undermines the FPC's present and future ability to perform its statutory duty of assuring "an abundant supply of electric energy throughout the United States" (*Village of Elbow Lake, Minnesota v. Otter Tail Power Co.*, —— FPC ——, (1971), A—141; see *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 423 (1952)), and thus deprives the public in this part of the United States of the benefits of interconnection and coordination in the generation and transmission of electricity. Again, we have here the very clash between the courts and the Commission which this Court has repeatedly warned must be avoided. *See e.g. United States Nav. Co. v. Cunard Steamship Co. Ltd.*, 284 U.S. 474 (1932), *Far East Conference v. United States*, 342 U.S. 570 (1952).

4. The decision below applies Section 2 of the Sherman Act to electric utilities in precisely the same manner as it would apply to tobacco companies or shoe manufacturers. This failure to consider the special circumstances of a regulated industry is plainly erroneous. As Justice Frankfurter stated in *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 92-93 (1953):

> "Prohibitory legislation like the Sherman Law, defining the area within which 'competition' may have full play, of course loses its effectiveness as the practical limitations increase; as such considerations severely limit the number of separate enterprises that can efficiently, or conveniently, exist, the need for careful qualification of the scope of competition becomes manifest. Surely it cannot be said in these situations that competition is of itself a national policy. To do so would disregard . . . those

> areas, loosely spoken of as natural monopolies or—more broadly—public utilities, in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation. . . . The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications."

Justice Frankfurter's caveat is particularly pertinent to electric utilities such as Otter Tail which are subject to comprehensive federal regulation under Part II of the Federal Power Act. As the Court of Appeals stated in *Pennsylvania Water & Power Co. v. FPC*, 193 F. 2d 230, 234 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952):

> "In marked contrast [to the antitrust laws] is a statute such as Part II of the Federal Power Act. It evidences congressional recognition that competition can assure protection of the public interest only in an industrial setting which is conducive to a free market and can have no place in industries which are monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing business. In place of competition as a generalized and indirect regulator of prices and services in the field of interstate transmission of electric energy at wholesale, Congress has substituted a regulatory agency authorized to supervise almost every phase of the regulated company's business."

The results of the district court's disregard of the above decisions and of its blind application of Section 2 are strikingly incongruous:

A. The court holds that every municipality served by Otter Tail constitutes a separate relevant market. A—62, 63, 65, 106. It concludes that Otter Tail is therefore a monopolist with respect to each such town. On this basis, each municipal power company is of course also a monopolist since, once it is established, it will generally control 100% of the town's business. Thus, far from affording consumers the "benefits of competition," (A—13), Otter Tail's ouster will merely serve to substitute one monopolist for another. This is hardly a result which Section 2 was intended to achieve.

B. The court also holds, in the alternative, that the relevant geographical market consists of all of the towns in Otter Tail's service area. A—8, 63, 64. It proceeds to compare the number of towns which Otter Tail serves with the total number of towns, finds that Otter Tail serves 75.6% of such towns and concludes on this basis alone that Otter Tail is a monopolist. A—8, 63, 64, 106. The court fails to mention that the populations of the towns being counted vary in size from 20 (in Sibley, North Dakota, served by Otter Tail) to 29,687 (in Moorhead, Minnesota, not served by Otter Tail). GX 2, p. 4. Dep. GX 287, p. 127. DX 94, p. 4. A simplistic headcount which treats all these diverse municipalities as equals thus has no relation whatsoever to economic reality. In point of fact, Otter Tail's sales account for only 28.9% of the total electric retail sales in its service area. DX 94. R. IX, 52-56, 107-112.

Even more fundamental, however, is the court's failure to consider the definition of "monopoly" which it first states, and then ignores for the remainder of its analysis. In the court's own language,

> "A monopoly condemned by the Sherman Act is *the power to fix prices or exclude competition* coupled with policies designed to use or preserve that power." (Emphasis added) A—7.

In fact, Otter Tail does not have a monopolist's unbridled power to "fix prices." Its rates are regulated by the state utility commission in North Dakota,[16] by municipalities in Minnesota[17] and South Dakota,[18] and by the FPC with respect to wholesale sales.[19] Otter Tail likewise does not have power to "exclude competition"—or, more accurately, to prevent another "monopolist" from excluding it from a given municipality. As we have noted, each municipality which has voted in favor of municipal power has in fact been able to establish its own, independent electric company. See pages 6-10, *supra*.

C. The court held that Otter Tail had "dominance of transmission facilities" in its service area. A—9, 10. In fact, all of the municipalities considered in the proceedings below had alternative transmission facilities available to them, with the possible exception of only two towns—Elbow Lake and Hankinson. As we have seen, these latter municipalities had recourse to administrative procedures to compel Otter Tail to sell power at wholesale, thus obviating any need to wheel electricity from third parties. The court thus again ignored the pertinent regulatory scheme which effectively precludes a utility from wielding "monopoly power" within the meaning of the antitrust laws.

D. The court ruled that the erosion and possible destruction of Otter Tail's business as a result of its holding is irrelevant to a determination of this case. A—20, 21. The court thus failed to take account of the effects of its decision on those of Otter Tail's customers who either do not wish, or are unable, to establish their own power companies. An electric

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[16] North Dakota Century Code, Tit. 49 Public Utilities, 49-01—49-21 (1971 Supp.).
[17] Minnesota Statutes §§ 300.03-04, 454.041-.043 (1927).
[18] South Dakota Compiled Laws 1967, § 9-35-1 (1939).
[19] 16 U.S.C. §§ 824, 824d-824g.

utility is able to furnish economic service only if enough customers are available to share the fixed costs of generation and distribution. As municipalities begin to opt out of Otter Tail's system, those who remain will necessarily have to pay increasingly higher rates to maintain service. If rates become so excessive that continued maintenance of the integrated system is no longer possible, then the utility will simply go out of business, as, for example, the railroads in certain parts of the country have done. While some of the wealthier municipalities may be able to maintain their own, independent systems, the interests of poorer communities and persons living in rural areas outside municipal limits may have to be sacrificed.

Thus, the government may have to directly assume responsibility for meeting the nation's power needs. In view of the undesirability of either of these possibilities, the FPC was clearly correct in stating that "[t]he welfare of Otter Tail is a part of the public interest." *Village of Elbow Lake, Minnesota v. Otter Tail Power Co.*, 40 FPC 1262, 1270 (1968) (A—131). This court has recognized that "[a] major purpose of the whole [Federal Power] Act is to protect power consumers against excessive prices." *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952). The statute itself expressly states Congress' "purpose of assuring an abundant supply of energy throughout the United States with the greatest possible economy. . . ." Sec. 202(a). The district court's failure to take any account of these considerations plainly constitutes reversible error.

E. Otter Tail is a small utility which faces substantial competition in its service area from rural electric cooperatives, the Bureau of Reclamation, municipal power companies and other investor-owned utilities. R. VI, 133, 134. R. VII, 36-62,

95, 96. R. IX, 107-112. R. X, 24, 25. Thus, if the district court is correct in its holding that Otter Tail is a monopolist, it would follow that most every other utility in the United States is also an illegal monopolist. In other words, applying the rule in *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966), virtually any action an electric utility may take to enlarge or preserve its market would be unlawful. For example, under *United States v. Aluminum Co. of America*, 148 F. 2d 416, 430-31 (2d Cir. 1945), the persistent and continued increase of capacity to meet expected demand was deemed the equivalent of exclusionary maneuvers. Yet such expansion of capacity is precisely what every electrical utility in the United States is trying to accomplish today and, indeed, must accomplish if massive blackouts and brownouts are to be avoided. The district court's blind application of Section 2 rulings relating to nonregulated industries is thus contrary to Congress' intent and the national welfare and should be reversed.

5. Under the judgment below, Otter Tail is prohibited from bringing *any* action—however meritorious it might be —which has "the purpose of delaying, preventing, or interfering with establishment [sic] of a municipal electric power system." This ruling plainly violates Otter Tail's right of free access to the courts which this Court has recognized as a part of the constitutional right to petition guaranteed by the First Amendment. *California Motor Transport Co. v. Trucking Unlimited*, 40 United States Law Week 4153, 4154-55 (January 13, 1972). *See also, Straus v. Victor Talking Mach. Co.*, 297 F. 791, 798 (2d Cir. 1924); *Cf. Boddie v. Connecticut*, 401 U.S. 371 (1971).

In contrast to *California Motor Transport Co.*, in the instant case there is no allegation (and *a fortiori* no proof) that

Otter Tail "sought to bar [its] competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process." All that Otter Tail did was to invoke the aid of the courts to challenge conduct which it believed in good faith to be illegal and which was aimed at ousting it entirely from particular municipalities. Such efforts to seek judicial redress to protect one's business are clearly protected by the First Amendment and by the doctrine first announced in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and reaffirmed in *California Motor Transport Co.*[20]

6. The opinion below reiterates the government charge that Otter Tail monopolized by "participating in local municipal power political campaigns." A—6. Such political behavior is specifically protected under this Court's decision in *Noerr*. Nevertheless, evidence of such conduct was admitted over Otter Tail's objection and was considered by the court in arriving at its conclusion that Otter Tail had monopolized. R.

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[20] It is also significant that the district court in the instant case did not find any "pattern of baseless, repetitive claims" which could have lead to the conclusion that "judicial processes [had] been abused." *Cf. California Motor Transport v. Trucking Unlimited*, 40 United States Law Week 4153, 4154 (January 13, 1972). On the contrary, suits brought or supported by Otter Tail were at least partially successful with respect to two towns (Aurora and Hankinson), and no litigation was commenced with respect to two of the six towns examined in the district court's Findings (Finley and Velva). Unlike the alleged practice of the defendant in *California Motor Transport Co.*, Otter Tail did not have a policy of litigating in every instance regardless of the merits. R. VII, 74-78. Dep. GX 287, p. 283, 284. The instant facts are thus critically different from those in the cases upon which the district court relied (A—15), where groundless suits were brought in bad faith as part of an overall conspiracy to monopolize. *See, e.g., Walker Process Equipment, Inc. v. Food Machinery & Chemical Co.*, 382 U.S. 172 (1965); *Plastic Contact Lens Co. v. Butterfield*, 366 F. 2d 338 (9th Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F. 2d 416 (10th Cir. 1952), *cert. denied*, 344 U.S. 837 (1952).

I, 17, 18, 65, 66, 71-73, 87, 91-93, 103-107. R. IV, 73-75, 82. A—6, 28, 32, 50, 51, 58. This, by itself, constitutes sufficient grounds for reversal under *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669-70 (1965).

7. The judgment below is striking in the utter lack of equity to justify the draconian injunction which the district court imposed. Although it refused to interconnect or wheel with respect to only two towns—one of which successfully compelled interconnection through an administrative proceeding—Otter Tail is now required to extend such service and thus promote its own ouster from any municipality which so desires. Because it instituted some suits, none of which prevented a single town from establishing a municipal power system, Otter Tail is henceforth restricted in its constitutional right of free access to the courts in the defense of its business. Because of the purportedly illegal clause in its interconnection and coordination contracts, the agreements have been invalidated in their entirety. In sum, the district court has misapplied the law of monopolization without regard to Federal Power Act goals so as to restrain a small, rural utility from taking any action to preserve its system. In so doing, the court has failed to recognize the interests of the consumers of electricity who depend on Otter Tail's system and who will therefore be most harmed by the court's judgment.

CONCLUSION

For the reasons stated above, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OTTER TAIL POWER COMPANY,

Defendant.

6-69-Civ-139

MEMORANDUM & ORDER

KENNETH C. ANDERSON, WILLIAM JAEGER and BARRY McNEIL, Washington, D.C. attorneys for plaintiff.
CYRUS FIELD and DAVID LUNDEEN, Fergus Falls, Minnesota, attorneys for defendant.

In this action brought under Section 2 of the Sherman Act the basic issue is whether the acts of Otter Tail Power Company, a Minnesota public utility, in refusing to sell electric power at wholesale, and refusing to wheel electric power to municipalities it formerly served at retail, constitute a monopolization of commerce in violation of the Act.

Filed Sep. 9, 1971
Harry A. Sieben, Clerk
By Lawrence R. Tapper, Deputy

The Sherman Act, Section 2, provides:

> "Every person who shall monopolize, or attempt to monopolize * * * any part of the trade or commerce among the several states * * * shall be guilty of a misdemeanor * * *, 15 U.S.C. §2.

Under Section 4 of the Act the United States District Court is vested with jurisdiction to restrain violations of the law. 15 U.S.C. §4. Plaintiff seeks such an injunction.

Defendant Otter Tail Power Company with headquarters at Fergus Falls, Minnesota, is an investor-owned utility primarily serving small towns in western Minnesota and eastern North and South Dakota. Its business is almost exclusively retail. Its operation consists of an integrated power system running the full gamut from initial production to final sale of electrical power combined with pool arrangements which supply emergency power reserves.

From time to time citizens of some of the municipalities served by defendant have worked for the establishment of municipally owned electric facilities. Otter Tail has opposed such movements and has refused to sell power at wholesale, or to "wheel" [1] power, to its former municipal customers who have converted or who seek to convert to municipal systems. Plaintiff claims this violates the Sherman Act. Defendant asserts this is but the exercise of proper business judgment aimed at protecting the integrity of its business.

The pleadings more particularly shape the issue. The government alleges that Otter Tail has sought to prevent the municipalities from shifting local electric service from defendant to other electric power systems, supplied either by Otter Tail or another supplier of power, by the following acts:

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[1] Wheel means to transport power for another supplier.

1. By refusing and threatening to refuse to sell power at wholesale to the proposed alternative local electric power system;

2. By refusing and threatening to refuse to wheel electric power from other wholesale suppliers to the proposed alternative local electric power system; and

3. By engaging in other activities designed to obstruct and defeat the attempt by municipalities to establish alternative local electric power system.

Otter Tail specifically denies that it has done anything in violation of Section 2 of the Sherman Act. In its Answer, paragraph IV, it

> "admits and alleges that it has refused to permit the use of Otter Tail's facilities (by furnishing either wholesale or wheeling service) to subsidize or support a new municipal electric system which is constructed for the purpose of ousting Otter Tail from the retail electric business in that municipality. Otter Tail also admits and alleges that it has attempted to use all reasonable means to continue in business, and to continue to furnish adequate and reliable service at reasonable rates at retail in the municipalities which are served by its integrated system, and in attempting to present its case that it is to their advantage not to sever their connection with Otter Tail's system and service."

The case was tried to the court June 1 through June 14, 1971. The parties stipulated to many of the facts. Plaintiff called eleven witnesses, the defendant three. Several extensive pretrial conferences preceded trial.

A summary of the facts essential to an understanding of the issue follows:

Otter Tail was incorporated in Minnesota in 1910. Its service area encompasses western Minnesota, northeastern South Dakota and eastern North Dakota. The company's integrated system consists of approximately 5,900 miles of interstate transmission lines which serve at retail, approximately 465 towns, mostly small communities of under 1,500 population. In 1969 Otter Tail sold 1,158,329 kilowatts (Kw.) of power to 103,829 customers, deriving a total operating revenue of $31,191,000. Otter Tail had a net generation capacity of 271,145 Kw. in 1969.

Otter Tail has entered into interconnection contracts with other electric systems. These contracts provide means by which the company can obtain power to supplement that provided by its own generation and sell excess power to others. One of Otter Tail's interconnections is with the United States Bureau of Reclamation. The relationship between the Bureau and Otter Tail is reflected in a comprehensive agreement which dates back to 1950. Pursuant to this contract, Otter Tail purchases a considerable volume of dump and secondary power from the Bureau.

Otter Tail is also directly interconnected with Minnesota Power and Light, Northern States Power Company, Northwestern Public Service Company, Montana-Dakota Utilities Company, Minnkota Power Cooperative, Central Power Association, United Power Association and several smaller rural electric cooperatives.

Generally speaking, Otter Tail provides retail service to municipalities pursuant to franchise agreements awarded to it by the city or town. By state law in each of the three states the franchises are non-exclusive and, depending upon the state, the franchise terms are limited to periods ranging from ten to twenty years. The franchises customarily grant Otter

Tail the right to construct and maintain electric distribution systems and necessary transmission lines, and operate these within the regulations and provisions imposed by the municipal overnment.

Otter Tail also regularly engages in the business of wheeling power. A large proportion of Otter Tail's wheeling activity is done pursuant to its contractual relationship with the Bureau of Reclamation. Beginning in the 1930's Congress appropriated funds for the construction of a series of hydroelectric generation facilities along the Missouri River in Montana, North Dakota and South Dakota. The Bureau of Reclamation of the Department of the Interior handles the marketing of the power generated by the facilities. Congress mandated that public bodies, REA electric cooperatives and municipal electric systems be designated as preference customers for this power; that is, that they be given first option to purchase the power.

The Congress also appropriated funds for the construction of high voltage transmission lines to transport Bureau power from the hydroelectric sites to the areas where the power was to be marketed.

In 1950 Otter Tail and the Bureau entered into the detailed contract which provided, *inter alia*, for the sale of dump power to Otter Tail and for the wheeling of Bureau power across Otter Tail transmission lines to preference customers. The Bureau pays a set wheeling fee to Otter Tail for this service. At the request of Otter Tail, a renewal contract dated June 14, 1955 contained language which, in the defendant's view, exempted it from any obligation to wheel power to towns which it previously had served at retail. Otter Tail does wheel power to 18 municipal preference customers which it has not previously served at retail. More background facts will be

recited in connection with the court's consideration of the issues.

The principal thrust of the government's case is that Otter Tail has a monopoly on the retail distribution and sale of power to towns in its operating area. It is not contended that defendant acted illegally or improperly in *achieving* this claimed monopoly position but rather in its actions seeking to *preserve* this position. Specifically, it is urged that Otter Tail's refusal to sell or wheel power to towns desiring to establish municipal systems, and its actions participating in local municipal power political campaigns, and sponsoring, encouraging, and financially supporting court litigation are all intended to impede and frustrate attempts to establish independent municipal electric systems.

Otter Tail does not deny its refusal to sell or wheel power to municipalities which it formerly served at retail but argues that to supply power to these municipalities would aid in its own demise. It admits its participation in local municipal political campaigns and in litigation surrounding attempts to establish municipal systems but contends this is proper and legal conduct. Such actions were taken, defendant argues, to preserve the electric power free enterprise system for the benefit of its customers, shareholders and employees.

Otter Tail denies that it has a monopoly, is attempting to preserve a monopoly, or that it possesses a dominant share of the pertinent market under Sherman Act principles. Defendant points to the many other electric power entities operating in the same area, particularly the United States Bureau of Reclamation, many electric cooperatives, Northern States Power Company, and other private power sources, from one or more of which electric power and the means of transmitting

this power are readily available to those municipalities which defendant does not choose to serve.

Otter Tail finally urges a "Rule of Reason" and argues that its conduct is fully justified by its legitimate right to fight for its corporate life, remain viable in serving the public and prevent the erosion of its integrated system and the impairment of its credit.

A monopoly condemned by the Sherman Act is the power to fix prices or exclude competition coupled with policies designed to use or preserve that power. The United States Supreme Court in its most recent decision on the question, *United States v. Grinnell Corp.*, 384 U.S. 563, 570, 86 S. Ct. 1698, (1966), said:

> The offence of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from the growth or development of a superior product, business acumen or historic accident.

The two principal questions involved are: (1) Does Otter Tail possess monopoly power, and (2) Has it sought to main-in that power?

The term relevant market consists of both a product market and a geographic market. *Grinnell*, supra. It is not disputed here that the product market is the sale of electric power at retail. Indeed more than 90% of Otter Tail's income is from retail sales.

There is dispute as to the definition of the geographic market. The government contends that each of the 465 towns served by Otter Tail constitutes a separate geographic market. If this not be accepted, the government urges that the geo-

graphic market is, at least, the towns in the Otter Tail service area.

There is some logical basis for considering each town a separate geographic market; but viewing it in a broader light, there are, in the Otter Tail service area, 465 towns served by Otter Tail and 45 towns served by municipal electric systems. On this basis it may be concluded that Otter Tail services approximately 91% of the relevant geographical market, certainly enough to justify the inference that the defendant possesses monopoly power in the area.

There are also 105 towns served by rural cooperatives in the Otter Tail service area. Because of congressional restrictions upon REA loans to cooperatives seeking to serve urban areas, it is doubtful that the 105 towns could be viewed as competitive and hence considered in determining Otter Tail's share of the total relevant market. But even if these 105 are considered as part of the market, the result still has Otter Tail serving 465 of the 615 towns in the area. This is 75.6 percent of the relevant market. In our view this percentage is sufficient to justify the inference that Otter Tail possesses monopoly power in the area.[2]

Having found that Otter Tail does possess monopoly power, the second question is whether Otter Tail has sought to *maintain* that power. A principal contention of the government is that the defendant has been able to maintain this power because of its strategic dominance of transmission capacity in most of the Otter Tail area.

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[2] (1) *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S. Ct. 1125 (1946); (2) *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521, 74 S. Ct. 699 (1954); (3) *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1699 (1966); (4) *United States v. E. I. du Pont de Nemours & Co. (Cellophane)*, 351 U.S. 377, 76 S. Ct. 994 (1956).

Several map exhibits in evidence reflect a maze of electric power lines covering, almost blanketing it would seem, the entire Otter Tail service area. Defendant urges that its transmission lines represent only 8% of the transmission lines of all power suppliers in the area.

Evidence at trial showed that electric power lines fall into three general categories:

(1) *Bulk power supply lines*, usually of a voltage of 115 Kv. or greater, which are intended to move large blocks of power from generating facilities to load centers.

(2) *Subtransmission lines*, usually of a voltage from 34.5 Kv. to 69 Kv. These are utilized to move power from the bulk power source to local retail distribution systems.

(3) *Distribution lines*, usually of a voltage of 12.5 Kv. or less, which move the power from the subtransmission network station to the ultimate consumer.

Most of the bulk supply lines in the Otter Tail area are owned and operated by the Bureau of Reclamation. The Bureau does not maintain its own subtransmission system but contracts with Otter Tail, and others, to transmit the power from bulk supply stations over their subtransmission lines to local retail distribution systems whence it is stepped down for delivery via distribution lines to customers.

About two-thirds of Otter Tail's total electric line mileage, or 4,036 miles, consists of 41.6 Kv. subtransmission lines. It appears that Otter Tail is dominant in operation of subtransmission lines in the area.

The contract between Otter Tail and the Bureau contains a provision [Para. 27(e)(2)] which Otter Tail interprets as meaning that it need not wheel Bureau power over its subtransmission lines to its former retail customers. Otter Tail

refuses to do so, the Bureau does not have its own subtransmission lines to use for that purpose and the transmission lines of others are not readily available in the area sought to be served. Hence many potential preference customers of the Bureau, including municipalities, are unable to obtain Bureau power because of the absence of available subtransmission lines and the refusal of Otter Tail to wheel that power over its lines. It is not economically feasible or practical for a municipality to construct its own subtransmission lines.

In support of its argument that Otter Tail does not have a dominance of transmission facilities, defendant showed at trial that 87,000 miles of electric power lines in the Otter Tail service area are owned by various rural distribution electric cooperatives. This testimony and other evidence established, however, that most of these lines are of a voltage of 12.5 Kv. and hence suitable only for *distribution to the customer and* not for *transmission*, which requires a heavier voltage, in the range of 34 to 69 Kv.

One of defendant's witnesses at trial, Mr. Nye, testified that the 12.5 Kv. cooperative lines in the vicinity of *Elbow Lake* and *Hankinson*, (two municipalities here involved and concerning which more will be said later) were not capable of transmitting power to these towns.

Northern States Power Company (NSP) does distribute retail power in some towns near the Otter Tail service area but it refuses to supply power to towns not in its own service area. For this reason NSP refused to supply Alexandria, Minnesota, and Coleman, South Dakota. Hence NSP is not an available power source for municipalities refused service by Otter Tail and desiring to convert to municipal ownership.

We conclude that Otter Tail has a strategic dominance in the transmission of power in most of its service area.

Much of the evidence at trial was directed to the claimed employment of this dominance in transmission to prevent municipalities in the area from obtaining power to operate municipally owned systems. The testimony dealt principally with five towns, Elbow Lake, Minnesota, Hankinson and Finley, North Dakota, and Coleman and Aurora, South Dakota, with the emphasis on happenings at Elbow Lake and Hankinson. A summary of events at each of these towns follows:

Elbow Lake, Minnesota, is a small county seat town near Fergus Falls. Elbow Lake was served at retail by Otter Tail until 1966 when the citizens voted for a municipally owned system. The defendant refused to furnish power at wholesale. Elbow Lake acquired its own generating plant. It sought stand-by power from Otter Tail which was refused. Litigation ensued. The Federal Power Commission ordered the defendant to furnish stand-by power. The Court of Appeals of the Eighth Circuit affirmed. *Otter Tail Power Co. v. Federal Power Commission*, 429 F. 2d 232 (8th Cir. 1970).

When Otter Tail refused to sell power to Elbow Lake, the town sought power, either as a sole source or on a stand-by basis, from the Bureau of Reclamation, the United Power Association, the Basin Electric Power Cooperative and the Runestone Electric Association.

Each of these sources was willing and able to furnish the power, but could not, as the power could only be delivered to Elbow Lake over Otter Tail's transmission lines, because of the restrictive provisions contained in the contracts between Otter Tail and the suppliers previously discussed, and because of Otter Tail's refusal to wheel the power. It was, and is economically unfeasible, for either Elbow Lake or the suppliers to build the required transmission facilities from the power source to Elbow Lake.

From all of the evidence, of which this is a short precis, the court concludes that Otter Tail employed its dominance in transmission in the Elbow Lake area to prevent Elbow Lake from obtaining electric power from outside sources of supply.

Otter Tail served Hankinson, North Dakota, with electric power under a 20-year franchise dated February 16, 1931. In 1947 the voters of Hankinson approved the establishment of a municipal electric system. Otter Tail refused to sell power at wholesale to Hankinson. The town sought power from the United States Bureau of Reclamation, the Basin Electric Power Cooperative and the RSR Electric Cooperatives. All three of these suppliers were dependent on the use of Otter Tail's transmission lines in transporting power from the nearest Bureau substation at Forman, North Dakota, some 39 miles from Hankinson. Otter Tail refused to wheel power over its lines to Hankinson. Again, it was not feasible for Hankinson to construct its own transmission line 39 miles to Forman. The Bureau was unable to do so for the same reason, with the result that Otter Tail's conduct prevented Hankinson from obtaining needed power to service a municipally owned system. The town abandoned its efforts and granted a new retail franchise to the defendant.

On the basis of the above the court finds that defendant has a monopoly in the relevant market and has consistently refused to deal with municipalities which desired to establish municipally owned systems on the alleged justification that to do so would impair its position of dominance in selling power at retail to towns in its service area. The court concludes that this conduct is prohibited by the Sherman Act. It is well established that the unilateral refusal to deal with another, motivated by a purpose to preserve a monopoly posi-

tion, is illegal. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S. Ct. 400 (1927); *Lorain Journal Co. v. United States*, 342 U.S. 143, 72 S. Ct. 181 (1951).

Here the defendant does not dispute that its purpose in refusing to deal with municipalities desiring to establish municipally owned systems is to protect itself in the position it now enjoys in the area. Such is a monopoly position, and the law prohibits conduct such as this when such is intended to preserve the monopoly.

A similar "refusal to deal" case was decided in this district in 1945, *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32, 39 (D. Minn. 1945). There Judge Nordbye capsulized the legal principal involved when he held that "a refusal to sell, while it may be lawful *per se*, cannot be used in order to achieve an illegal result."

Here Otter Tail refuses to sell power to municipalities which would thereby take retail power business from defendant and refuses to wheel power for others willing to sell to those municipalities. Because of its dominant position Otter Tail is able to deprive towns of the benefits of competition which would result from municipally owned facilities.

Pertinent to an examination of the law is a reference to cases expressive of the "bottleneck theory" of antitrust law. This theory reflects in essence that it is an illegal restraint of trade for a party to foreclose others from the use of a scarce facility. Here the theory finds application in Otter Tail's use of its subtransmission lines. One authority believes:

> "The Sherman Act requires that where facilities cannot practically be duplicated by would-be competitors,

those in possession of them must allow them to be shared on fair terms." [4]

This statement epitomizes the holdings in federal cases which have established the principle: *United States v. Terminal Railroad Assoc.*, 224 U.S. 383, 32 S. Ct. 507 (1912); *Gamco, Inc. v. Providence Fruit & Produce Building Inc.*, 194 F. 2d 484 (1st Cir. 1952); *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F. 2d 708 (3rd Cir. 1958); *Six Twenty-Nine Productions, Inc, v. Rollins Telecasting, Inc.*, 365 F. 2d 478 (5th Cir. 1966).

The bottleneck principle is applicable to Otter Tail. Its control over transmission facilities in much of its service area gives it substantial effective control over potential competition from municipal ownership. By its refusal to sell or wheel power, defendant prevents that competition from surfacing.

COURT LITIGATION

The efforts of Elbow Lake, Hankinson, Aurora and Colman, South Dakota, to establish municipal power systems were opposed by the defendant in court proceedings. Otter Tail either instituted or sponsored and financially supported court litigation which had the effect of frustrating the sale of revenue bonds to finance the municipal systems. A "no-litigation certificate," reflecting the absence of litigation which might impair the salability of revenue bonds, is essential to a successful sale of municipal bonds. The pendency of litigation has the effect of preventing the marketing of the necessary bonds thus preventing the establishment of a municipal system.

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[4] *A. D. Neale, The Antitrust Laws of the U.S.A.*, Cambridge University Press at 67 (1960).

Most of the litigation sponsored by the defendant was carried to the highest available appellate court and although all of it was unsuccessful on the merits,[3] the institution and maintenance of it had the effect of halting, or appreciably slowing, efforts for municipal ownership. The delay thus occasioned and the large financial burden imposed on the town's limited treasury dampened local enthusiasm for public ownership. In some instances, Otter Tail made offers to the towns to absorb the towns' costs and expenses, and enhance the quality of its service in exchange for a new franchise. Hankinson, after several years of abortive effort, accepted this type of offer and renewed defendant's franchise.

While every person has the right to resort to the courts to redress claimed wrongs, the right is not without limitation. One who enjoys a monopoly may not resort to litigation for the purpose of illegally maintaining the monopoly. The Ninth Circuit has observed that "* * * litigation can be an integral part of a scheme prohibited by the Sherman Act." *Trucking Unlimited v. California Motor Transport Co.*, 432 F. 2d 755, 760 (9th Cir. 1970).

This legal principle is well established and has been expressed in patent cases particularly in connection with the institution of infringement suits. See *Walker Process Equipment Inc. v. Food Machinery & Chemical Co.*, 382 U.S. 172, 86 S. Ct. 347 (1965); *Plastic Contact Lens Co. v. Butterfield*, 366 F. 2d 388 (9th Cir. 1966); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F. 2d 416, 424 (10th Cir. 1952).

In *Kobe*, supra, the court said:

"* * * we must not permit the courts to be a vehicle for maintaining and carrying out an unlawful monopoly

[3] With the possible exception of litigation in Aurora where the court held that Otter Tail had no standing to sue.

which has for its purpose the elimination and prevention of competition."

The court finds that the litigation sponsored by defendant was instituted for the purpose of delaying and preventing the establishment of municipal electric systems with the expectation that this would preserve its predominant position in the sale and transmission of electric power in the area.

Defendant urges that the so-called *Noerr* doctrine, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523 (1961), exempts its conduct in the field of court litigation from antitrust attack.

But the *Noerr* principle is applicable only to efforts aimed at influencing the legislative and executive branches of the government. It only immunizes political activity directed toward the enactment and enforcement of the laws from antitrust attack. See *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F. 2d 1286 (5th Cir. 1971), and *Trucking Unlimited v. California Motor Transport Co., supra.* *Noerr* does not free from antitrust sanctions the institution of court litigation.

From all of the evidence it appears that defendant, by refusing to deal with municipalities and by conducting or sponsoring court litigation, has violated Section 2 of the Sherman Act and monopolized or attempted to monopolize the sale of electric power in its service area.

IMMUNITY AS A RESULT OF "VALID GOVERNMENT ACTION"

But Otter Tail takes the position that since it contracted with government agencies with reference to the delivery of power, it is thereby immune from antitrust sanctions.

It will be recalled that Otter Tail's agreement with the Bureau of Reclamation contains a provision which defendant interprets as freeing it from any obligation to wheel power from the Bureau to any municipality which received retail service from Otter Tail as of the date of the contract, that is, June 14, 1955. Further, Otter Tail's transmission agreements with certain cooperatives (Cooperative Power Association, Lyon-Lincoln Electric Cooperative, Inc. and Traverse Electric Cooperative, Inc., RSR Electric Cooperative, Inc. and East River Cooperative, Inc.) contain provisions which prohibit the use of defendant's transmission system to supply power from the cooperatives to a retail customer served by Otter Tail. These contracts also extend the same prohibition with respect to customers served by the cooperatives.

It is urged by Otter Tail that these restrictive provisions are immune from antitrust attack. The gist of this contention seems to be that since the Bureau is a government instrumentality and the REA administrator approved the contracts with the cooperatives, the contracts are the result of "valid governmental action," thus falling within the scope of *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*, 394 F. 2d 672 (5th Cir. 1968).

In my view there is no merit in this contention. The *Alabama Power* case is inapposite. The restrictive provisions here are, in reality, territorial allocation schemes. Agreements among competitors to allocate customers or territories are *per se* violations of the Sherman Antitrust Act. *Northern Pacific Railroad v. United States*, 356 U.S. 1, 78 S. Ct. 514 (1958). Our Eighth Circuit has held to the same effect. *Montana-Dakota Utilities Co. v. Williams Electric Cooperative, Inc.*, 263 F. 2d 431 (8th Cir. 1959). There the court condemned a contract provision between an investor-owned utility and

a rural electric cooperative allocating marketing territories as a *per se* antitrust violation. The court said:

> By the great weight of authority in this country, the rule has been promulgated and consistently applied that contracts between quasi-public corporations, having for their object the division of territory between such companies, are against public policy, and being so, are absolutely void, untempered by any application of the 'rule of reason.' *Montana-Dakota Utilities* at 434.

A recent decision of the Court of Appeals for the District of Columbia Circuit, *Hecht v. Pro Football, Inc.*, —— F. 2d —— (D.C. Cir. 1971) held that a public armory board, in leasing a public stadium to a professional football team exclusively for a period of 30 years, was not immune from the antitrust laws.

In *Hecht*, the court held that in order for antitrust immunity to attach to action by a governmental body there must be specific and unequivocal language to this effect in the enabling statute.

> "The basic philosophy of our antitrust policy has been so long established, is of such recognized economic importance, and has assumed in the statutory scheme of things such high dignity that a contrary Congressional intent of 'immunity from antitrust laws 'is not lightly implied'.' " *Hecht* at ——.

There is nothing in any of the legislation under which either the Bureau of Reclamation markets its power or the rural electric cooperatives operate which either expressly or impliedly confers immunity from antitrust laws upon the actions of the Bureau in negotiating contracts for sale of power or

upon the action of the REA administrator in approving contracts between a cooperative and a private power company.

The record reflects it was reluctantly, and only after a determination that no other transmission facilities were available, that the Bureau signed the contract with defendant which contained the restrictive provision in question. In addition, the Bureau interpretation of the contract varies from that of the defendant. The Bureau officials were and are of the view that the provision is not a blanket restriction but requires the defendant to give separate consideration and to reach separate judgment as to each applicant for transmission service over defendant's lines.

In order for antitrust immunity to attach in situations of this kind there must be a clear indication that Congress, in enacting the law, considered the competing interests of antitrust policies and whatever policy is best served by the other competing interest, and expressed a clear judgment that the antitrust policy should be suspended. There is no such showing here. No antitrust immunity attached to the contracts or to the parties executing them.

That which defendant refers to as the "heart of the case" is its argument that if Otter Tail is required to sell power at wholesale or wheel power to its former retail customers, it will be contributing to its own corporate death because more and more muncipalities would then change to municipal ownership to obtain the cheaper Bureau power. Eventually, defendant claims, most of its customers would convert and the Otter Tail system would be eroded to the detriment of its customers, stockholders and employees. This argument was pressed hard by defendant and its president, Albert Hartl, who testified vigorously and eloquently in defense of privately owned utilities vis-a-vis public power interests.

Of course, it should be remembered that a public utility which operates without exclusive franchises from its customers does not have a right to be free of competition. *Rural Electrification Administration v. Central Louisiana Electric Company*, 354 F. 2d 859 (5th Cir. 1966). This has long been the law and extends to competition from municipally owned facilities. *Alabama Power Co. v. Ickes*, 302 U.S. 464, 58 S. Ct. 300 (1938).

One principal purpose of the Sherman Act is to insure competition. Otter Tail cannot violate the law albeit its avowed purpose is to protect the integrity of its business.

The Supreme Court recently held that the Schwinn Bicycle Company could not employ anti-competitive methods in order to preserve its business which was gradually but markedly going downhill. *United States v. Arnold Schwinn and Co.*, 388 U.S. 365, 375, 87 S. Ct. 1856 (1967). The court said:

> "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct."

So here there appears to be no legal justification for conduct which violates the Sherman Act.

A so-called "erosion study" (DX 41) offered by defendant sought to foretell its financial disaster if it is required to serve its former customers which convert to municipal operation.

The pessimistic view of the matter suggested by the defendant is not supported by the record. The Bureau of Reclamation now furnishes power to only two towns previously served by Otter Tail, to wit, Colman and Aurora, South Dakota. Elbow Lake also has an allocation of power for future use. The Bureau's generating capacity is now fully committed, it has denied requests for allocation of power from several applicants, including Sioux City and Aurelia, Iowa, and no new

generating capacity is scheduled to be activated. It is not unlikely that some present Bureau customers will have to find a continued power source elsewhere. All in all, it does not appear that Bureau of Reclamation power is a serious threat to the defendant nor that it will be in the foreseeable future.

But regardless, as stated, even the threat of losing business does not justify or excuse violating the law.

The court finds from a preponderance of the evidence that the defendant has attempted to monopolize, and has monopolized, interstate commerce in the retail distribution of electric power in violation of Section 2 of the Sherman Act.

NOW THEREFORE, the defendant and its agents are enjoined from any and all conduct, whether expressed in terms of contracts, policies, or practices, having the effect of continuing the violations of the Sherman Act herein found to exist.

Plaintiffs' counsel shall promptly present suggested detailed Findings of Fact, Conclusions of Law and Order for Judgment reflective of these expressions together with a form of Judgment.

Dated: September 9, 1971.

EDWARD J. DEVITT
Chief Judge
United States District Court

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OTTER TAIL POWER COMPANY,
Defendant.

6-69-Civ-139

FINDINGS OF FACT AND CONCLUSIONS OF LAW

KENNETH C. ANDERSON, WILLIAM JAEGER and BARRY McNEIL, Washington, D. C., attorneys for plaintiff.

CYRUS FIELD and DAVID LUNDEEN, Fergus Falls, Minnesota, attorneys for defendant.

In this Section 2 Sherman Act case, tried to the Court June 1, 1971 through June 14, 1971, the Court makes Findings of Fact and Conclusions of Law in supplement of its Memorandum and Order of September 9, 1971, as follows:

I. JURISDICTION

1. This is an action brought by the United States under Section 4 and Section 2 of the Sherman Antitrust Act (15 U.S.C. §§ 4, 2).

2. Otter Tail Power Company (hereinafter "Otter Tail"), an investor-owned electric utility, is a corporation organized

and existing under the laws of the State of Minnesota, with its principal place of business in Fergus Falls, Minnesota. [Ans., part I]. It maintains offices, transacts business and may be found within the District of Minnesota, Sixth Division [Ans., part I].

3. Otter Tail is engaged in interstate commerce within the meaning of Section 2 of the Sherman Act. Otter Tail engages in the generation, transmission and distribution of electric power and energy for municipalities, rural customers, rural electric cooperatives and investor-owned utilities located generally in western Minnesota, eastern North Dakota, and northeastern South Dakota. Otter Tail, an integrated transmission system, delivers power across state lines to customers throughout this tri-state area. [Ans., part I]. 44% of Otter Tail's customers are located in Minnesota, 46% in North Dakota and 10% in South Dakota. [DX 95, Schedule 2].

II. DESCRIPTION OF OTTER TAIL POWER COMPANY

4. Otter Tail operates an integrated electric system. Its generating stations are linked together and connected to its customers by an extensive network of transmission lines over which power is delivered to its customers. [Ans., part I; Hartl Tr. VI: p. 123]. In 1970 Otter Tail operated generating units with a net generation capacity of 272,245 kilowatts; its 1969 capacity was 271,145 kilowatts. [GX 426, p. 23]. In 1970 Otter Tail's transmission system consisted of 5,992 miles of line of varying voltages. [GX 426, p. 22].

5. In 1970 Otter Tail sold 1,321,998,594 kilowatt-hours (kwh) of electric power to 104,316 customers, for which it received total electric revenue of $34,153,292. [DX 95, Schedule 1]. In 1969 Otter Tail sold 1,158,379 kwh of electric power

to 103,829 customers from which it received total electric revenue of $31,191,000. [GX 426, p. 22]. Otter Tail's electric revenues have steadily increased since the company's inception in 1907. During the decade 1960-1970 Otter Tail's revenue from the sale of electric power and energy increased from $19,945,762 to $34,153,192, an increase of approximately 70%. [DX 95, Schedule 1].

6. Otter Tail's electric system is physically interconnected with other electric suppliers, including privately owned utilities, rural electric cooperatives, the Bureau of Reclamation (hereinafter "Bureau") and municipal electric systems. These interconnections permit to Otter Tail to purchase electric power to supplement that provided by its own generation as well as to sell and wheel power to the other electric systems, and they provide a means to increase reliability of service. [Hartl Tr. VI: pp. 123-125].

7. There are 14 interconnections between Otter Tail's electric system and that of the Bureau. [GX 443]. The Otter Tail-Bureau interconnections provide a means for Otter Tail to purchase electric power and energy from the Bureau. Otter Tail has purchased substantial amounts of electric power and energy from the Bureau each year beginning in 1955. In 1970 Otter Tail purchased 274,042,381 kilowatt-hours of electric energy from the Bureau at a total cost of $1,242,533.49. [GX2, p. 4; GX 211, p. 24].

8. Otter Tail is a charter member of the Upper Mississippi Valley Power Pool which consists of 18 electric power suppliers located in several different states. The pool coordinates the planning of new generation and transmission and provides a means for the members to sell power to each other. [GX 23 through GX 37]. Otter Tail is also a charter member of Mid-

Continent Area Power Planners (MAPP), an organization consisting of 54 utilities operating in ten states in the Upper Midwest. The purpose of MAPP is to plan and coordinate the scheduling and construction of production and transmission facilities in the ten-state area. [Hartl Tr. VII; pp. 8-9]. Otter Tail has willingly coordinated and interconnected its electric facilities with those of other electric utilities through separate agreements with other electric suppliers. [Hartl Tr. VII; p. 9].

III. CHRONOLOGY OF EVENTS IN TOWNS WHICH ATTEMPTED TO ESTABLISH MUNICIPAL ELECTRIC SYSTEMS

A. *Elbow Lake, Minnesota*

9. Elbow Lake renewed Otter Tail's franchise to serve the village on July 30, 1940 for a twenty year term. [GX 85].

10. At a special election on September 2, 1949 the voters of Elbow Lake approved establishment of a municipal electric system by a vote of 452 Yes and 130 No. [GX 2, p. 2].

11. On March 1, 1950, the Village Council accepted the bids of several companies to supply the equipment for and construct the municipal electric system, including the bid of Fairbanks, Morse & Company to supply the diesel generators which would supply the power for the proposed municipal electric system. [GX 87, p. 9].

12. On March 29, 1950, Otter Tail advised Elbow Lake that it would not sell its distribution system in the village. [GX 86].

13. On April 24, 1950, the Village Council passed a resolution approving the issuance and sale of $275,000 in revenue certificates to finance construction of the municipal electric system, and set May 16, 1950 as the deadline by which interest

ed parties had to submit bids to purchase them. [GX 87, p. 12].

14. On May 12, 1950, Otter Tail, and three Elbow Lake residents filed a suit against Elbow Lake seeking to enjoin the sale of the revenue certificates and the construction of the municipal electric system. The complaint alleged, *inter alia*, (1) that the engineer's proposal for construction of the municipal system contained specifications and designs which were too vague, indefinite and restricted as to preclude competitive bidding; (2) that the bids accepted and the contracts negotiated pursuant to the engineer's proposal were therefore null and void; (3) that Elbow Lake acted illegally in negotiating a contract covering the purchase of a watt-meter because the lowest responsible bidder was not chosen; (4) that Elbow Lake acted illegally in accepting the bid for the generating equipment inasmuch as only one company submitted a bid; and (5) that the revenue certificates did not contain language sufficient to protect Elbow Lake from general liability in the event the Village failed to perform acts agreed upon under the terms of the certificate. [GX 87].

15. On May 13, 1950, the court issued a temporary restraining order against Elbow Lake. [GX 88].

16. On September 11, 1950, the trial court ruled in favor of Elbow Lake and dissolved the temporary restraining order. The court specifically ruled that (1) the engineer's specifications did not limit competitive bidding, (2) all contracts entered into were proper and legal, and (3) the revenue certificates contained protective language sufficient to shield the Village from general liability on the certificates. [GX 89].

17. Otter Tail appealed the trial court's decision, and on June 22, 1951 the Supreme Court of Minnesota unanimously affirmed the trial court's decision. The Court specifically re-

jected Otter Tail's argument, holding that (1) a municipality is not bound under state law to accept the lowest bid submitted, but rather is bound to accept the lowest responsible bid which involves considerations of quality, suitability and price; (2) there was ample evidence supporting Elbow Lake's contention that the engineer's specifications were drawn so as to allow competitive bidding; (3) the Village did not act improperly in accepting the only submitted bid for generating equipment; and (4) the revenue certificates did not create a general liability of the Village. [GX 90].

18. On September 8, 1952, Otter Tail offered to pay Elbow Lake $14,000 to reimburse the Village for the expenses incurred in its effort to establish a municipal system, on condition that Elbow Lake abandon its efforts to establish a municipal system and sign a new street light contract. The same day the Village Council accepted this settlement offer. [GX 295].

19. On June 6, 1960, Otter Tail requested the Village Council to grant Otter Tail a new franchise and sign a new municipal service contract. The Council refused to approve the new franchise and Otter Tail's franchise to serve Elbow Lake expired on July 30, 1960. [GX 296, p. 1; GX 2, Schedule A, p. 23].

20. On September 5, 1961, the Village Council retained K. B. MacKichan & Associates (MacKichan) to prepare an engineering feasibility study of a municipal electric system in Elbow Lake. [GX 296, p. 4]. On November 24, 1961, MacKichan submitted its engineering report to the Village Council. The report concluded that a municipal electric system would be feasible and economical and analyzed eight possible power supply arrangements, seven of which involved either buying the Otter Tail distribution system in the village or

purchasing power at wholesale from Otter Tail or having Otter Tail wheel power from the Bureau of Reclamation to the village. The eighth alternative was that the Village construct its own generation and build a new distribution system. [GX 299].

21. Warren Nye, Vice President of Otter Tail, analyzed the MacKichan report and informed the company's district manager in Elbow Lake's area that the first seven power supply arrangements need not be considered because they required the cooperation of Otter Tail, thus leaving only the eighth alternative of construction of both a generating plant and a new distribution system by Elbow Lake. [GX 101].

22. On December 4, 1961, Otter Tail distributed a circular to the residents of Elbow Lake which criticized the MacKichan report. The circular further stated that Otter Tail would not sell power at wholesale to the town, that the town would have to construct a transmission line and other facilities costing up to $1,000,000 to receive power from the Bureau of Reclamation and that the only way Elbow Lake could get power for a municipal electric system would be to build a generating plant. [GX 111].

23. On December 22, 1961, the Village Council scheduled a special election for January 23, 1962, to decide whether to issue $715,000 of electric revenue certificates to finance construction of a municipal generation and distribution system. [GX 296, p. 5]. At the special election on January 23, 1962, the citizens of Elbow Lake approved a municipal electric system by a vote of 538 to 160. [GX 296, p. 7; GX 2, p. 2].

24. On February 17, 1962, Elbow Lake asked Otter Tail whether the company would discuss the sale of its distribution system in Elbow Lake and discuss the sale of power at wholesale to the Village. On February 26, 1962, Otter Tail responded

that it had no interest in selling its distribution system to the Village nor would it sell power to Elbow Lake on a wholesale basis. [GX 91, GX 92].

25. On September 4, 1962, the Village Council approved the plans and specifications for the municipal power plant and the electrical distribution system prepared by K. B. MacKichan & Associates, and set October 1, 1962 as the date for receipt of construction bids. [GX 296, p. 15].

26. On October 1, 1962, three companies submitted bids to construct the electric distribution system and two companies submitted bids to construct the municipal power plant. On October 5, 1962, the Village Council awarded the contract to construct the electric distribution system to Northolt Electric Company and awarded the contract to construct the municipal power plant to Fairbanks, Morse & Company. [GX 296, pp. 17-19].

27. On October 10, 1962, the Village Council approved a resolution calling for the issuance and sale of $670,000 of electric revenue certificates, and setting October 30, 1962 as the date for receipt of bids on the bonds. [GX 296, p. 20; GX 106, p. 6].

28. On October 29, 1962, Otter Tail and A. L. Anderson filed a lawsuit against the Village of Elbow Lake, the members of the Village Council, K. B. MacKichan & Company, Fairbanks, Morse & Company, and Northolt Electric Company seeking to enjoin the construction of the municipal electric system and the issuance and sale of the electric revenue certificates. The complaint alleged, *inter alia*, that (1) the plans and specifications for the municipal electric system were illegal because they restricted competitive bidding, (2) certain bids accepted by the Village did not conform with the plans

and specifications, and (3) the prospectus for the sale of the bonds contained material misrepresentations. [GX 105].

29. As a result of Otter Tail's lawsuit filed the day before, no bidders appeared before the Village Council on October 30, 1962 to bid for the revenue certificates. [GX 296, p. 21].

30. On August 8, 1963, the trial court dismissed Otter Tail's lawsuit against Elbow Lake. The court held, *inter alia*, that (1) the contracts negotiated by Elbow Lake were in all respects proper and legal; (2) Elbow Lake exercised proper business judgment in accepting and awarding bids and (3) the plans and specifications were sufficiently precise to afford a proper basis for competitive bidding and were in all respects reasonable and proper. [GX 106].

31. On February 20, 1964, the trial court entered a judgment dismissing Otter Tail's complaint against Elbow Lake. On March 7, 1964, Otter Tail filed notice of appeal with the Minnesota Supreme Court. [DX 43, p. 1].

32. On May 4, 1964, during the pendency of the appeal, Mr. Hartl of Otter Tail made a settlement offer to the Mayor and Village Council to the effect that Otter Tail would reimburse the Village for all expenses incurred by it in connection with the municipal power project, install a new white way system, improve all other street lighting, make available the most favorable municipal pumping rate, and withdraw from litigation pending with the Village on condition that Elbow Lake grant Otter Tail a new franchise and sign a municipal services contract. [GX 93]. The Village rejected the offer.

33. On July 8, 1964, the Bureau of Reclamation allocated 205 KW of firm power to Elbow Lake. Elbow Lake had applied to the Bureau for an allocation on August 5, 1963. [GX 259; GX 214]. On August 5, 1964, Elbow Lake requested that the Bureau allot the Village more power, but on September

18, 1964, the Bureau advised the Village that the Bureau had no additional firm power available. [GX 260; GX 261].

34. On December 14, 1964, the Mayor of Elbow Lake asked the Bureau whether the Village could compel either Otter Tail or Runestone Electric Cooperative to wheel power from the Bureau to the Village and whether the Bureau would build, at its expense, a transmission line to deliver Bureau power to the Village. [GX 262]. On December 23, 1964, the Bureau responded and advised the Mayor that the Bureau would ask Otter Tail to wheel Bureau power to the Village once the plans for the municipal electric system were firmed up. The Bureau also advised the Village that the Bureau had no wheeling contract with Runestone Electric Cooperative. Finally, the Bureau stated that to provide loop service to Elbow Lake would require construction of 113 miles of transmission line and that the Village would have to pay a major part of the costs to construct the line and associated facilities. [GX 263].

35. On February 5, 1965, the Minnesota Supreme Court unanimously affirmed the trial court's dismissal of Otter Tail's lawsuit against Elbow Lake. The court specifically held that (1) a municipality has the right to tailor engineering specifications to fit the community's needs and there was no evidence that the specifications were based on favoritism or fraud; (2) the evidence indicated that several manufacturers produced equipment meeting the specifications, and if they did not bid, it had to be presumed that they could not meet the competitive price; (3) the bid submitted by Fairbanks, Morse & Company embodied a sufficient warranty so that the bid complied with the plans and specifications; (4) the plans and specifications were sufficiently definite to permit competitive bidding and were legal and proper, and (5) there were no

material misrepresentations in the prospectus. [GX 106A—Decision reported in 270 Minn. 262, 133 N.W. 2d 511].

36. The lawsuit filed by Otter Tail against Elbow Lake on October 29, 1962, delayed establishment of the municipal electric system in the village by two and one-half years.

37. At the Village Council meeting on February 9, 1965, Otter Tail's district manager presented a settlement proposal to the Council similar to the offer made by Mr. Hartl to the Village on May 4, 1964. The Village Council rejected the offer. He also advised the Council that Otter Tail would take no further legal action against the proposed municipal electric system. He further stated that Otter Tail would not sell power at wholesale or wheel power to the Village. [GX 296, p. 33].

38. On February 25, 1965, the Bureau advised Otter Tail that it had allocated power to Elbow Lake and was exploring ways of delivering power to the Village. The Bureau asked whether Otter Tail had sufficient excess capacity in its transmission system to permit it to wheel Bureau power to Elbow Lake. [GX 264].

39. On February 26, 1965, Mr. Hartl of Otter Tail repeated his settlement offer to the Mayor and Village Council. The offer was identical to the one Otter Tail had made on May 4, 1964 with the addition of an offer to place a three man area line crew in Elbow Lake and to construct an area service building in the Village. [GX 95].

40. On March 8, 1965, Ulteig Engineers, a consulting engineering company, submitted, at the request of Otter Tail, a report to the Village Council which recommended that the Village reconsider its decision to proceed with a municipal electric system and examine the benefits of continued retail service from Otter Tail. Otter Tail paid Ulteig for the preparation of the report. [GX 434; Hartl Depo. GX 287, pp. 280-81].

41. On April 6, 1965, the Village Council received bids for the purchase of $670,000 of revenue bonds to finance construction of the municipal electric system. The bid of E. J. Prescott & Co. was accepted. Otter Tail representatives at the meeting were asked whether Otter Tail would file any more lawsuits against the Village and they responded that Otter Tail would use any legal means to protect its investment in the Village. [GX 296, p. 26; GX 104].

42. On April 14, 1965, Otter Tail responded to the Bureau's request to wheel power to Elbow Lake. Otter Tail asserted that Section 27 of the Bureau-Otter Tail contract prohibited the use of Otter Tail's transmission facilities to wheel power to a town served at retail by Otter Tail. [GX 265].

43. On May 5, 1965, Elbow Lake informed the Bureau that it would soon start construction of its municipal electric system and asked what needed to be done to deliver the Village's allocation of Bureau power. [GX 267]. On May 27, 1965, the Bureau informed Elbow Lake that Otter Tail had refused to wheel Bureau power to the Village and thus the Bureau could not enter into a power service contract with Elbow Lake because no method of delivering the power to the Village had been found. [GX 268; GX 269].

44. On July 8, 1965, Elbow Lake asked United Power Association, (UPA), a generation and transmission cooperative located in Elk River, Minnesota to furnish electric service to Elbow Lake. [GX 297]. On July 16, 1965, UPA informed Otter Tail of Elbow Lake's request for power, and stated that UPA would not serve Elbow Lake without Otter Tail's consent and help in delivering the power because UPA had no transmission lines in the Elbow Lake area. [GX 107]. On July 23, 1965, Otter Tail advised UPA that it would not be in the best inter-

ests of the electric power industry to use Otter Tail's transmission facilities to wheel power to Elbow Lake. [GX 108]. On August 10, 1965, UPA advised Elbow Lake that it was unable to make the arrangements with other parties necessary to deliver power to the Village. [GX 298].

45. On March 16, 1966, Elbow Lake filed an application with the Federal Power Commission for an interconnection with the Otter Tail system. [GX 84, p. 6—Stipulation # 13].

46. In June 1966 construction of the municipal electric system in Elbow Lake was completed. The system was supplied with power from an isolated generating plant in Elbow Lake which has no interconnection with Otter Tail's system. [GX 84, pp. 5-6—Stipulations # 10 and 11]

47. On June 17, 1966, Elbow Lake advised the Bureau that the municipal electric system was operational and requested an extension of its allocation of Bureau power. On November 25, 1966, Elbow Lake again asked the Bureau for an extension of time to enter into a power contract with the Bureau. The Bureau granted an extension to June 30, 1967. [GX 271, 273, GX 274].

48. On December 7, 1966, Elbow Lake, at the suggestion of the Federal Power Commission staff trying to settle the FPC litigation between Elbow Lake and Otter Tail, again asked Otter Tail whether the company would negotiate to sell power at wholesale to the Village. On December 13, 1966, Otter Tail repeated its refusal to sell power at wholesale or wheel Bureau power to Elbow Lake. [GX 96; 97].

49. On April 28, 1967, Basin Electric Power Cooperative, in response to a request for power from Elbow Lake, advised the Village that Basin would sell power at wholesale to Elbow Lake. Basin stated that it could only deliver power at the nearest Bureau substation from which point Elbow Lake would

have to arrange to have the power wheeled to its system. [GX 304]. On May 3, 1967, Elbow Lake informed Otter Tail of Basin's wholesale sale offer and requested Otter Tail to wheel the power to the Village. On May 11, 1969, Otter Tail again refused to wheel any power to Elbow Lake. [GX 305; GX 98].

50. On April 26, 1968, Elbow Lake asked the Department of Interior to request Runestone Electric Cooperative (Runestone) of Alexandria, Minnesota, which had a substation near Elbow Lake, to wheel Bureau power to the Village. On May 17, 1968, the Department of Interior advised Elbow Lake that the Bureau would investigate the possibility of delivering power to Elbow Lake through the Runestone system. [GX 276, GX 277].

51. On June 5, 1968, the Bureau again asked Otter Tail whether it would wheel power to Elbow Lake. On August 28, 1968, Otter Tail again notified the Bureau that it would not wheel power to Elbow Lake. [GX 278, GX 279].

52. On June 18, 1968, the Bureau informed Elbow Lake that Otter Tail's consent was necessary before Runestone could wheel Bureau power to Elbow Lake, because Runestone purchased its power from Cooperative Power Association (CPA) which in turn bought a large block of power from the Bureau. The Bureau emphasized that Bureau power delivered to CPA for Runestone had to be wheeled over Otter Tail's transmission lines. [GX 282].

53. On June 18, 1969, the Bureau asked Runestone whether it could arrange to wheel Bureau power to Elbow Lake. On July 22, 1968 Runestone advised the Bureau that a provision of the integrated transmission agreement between Otter Tail and Cooperative Power Association [GX 22] required that Otter Tail had to give its consent before Otter Tail's transmission facilities could be used to wheel power to a customer

which Otter Tail served at retail on or after January 13, 1966. Runestone conveyed the same information to Elbow Lake on August 19, 1968. [GX 281, GX 344, GX 345].

54. On September 24, 1968, the Bureau advised Elbow Lake that the Bureau was unable to secure a means to deliver Bureau power to the Village, and that Otter Tail still refused to wheel. [GX 284].

55. On November 22, 1968, Runestone advised Elbow Lake that the only impediment preventing Runestone from wheeling Bureau power to Elbow Lake was the provision in the transmission agreement between Otter Tail and Cooperative Power Association, Runestone's supplier, which required Otter Tail's consent before Otter Tail's transmission facilities could be used to serve a customer which had been served by Otter Tail on or after January 13, 1966. [GX 346].

56. On October 1, 1970, Elbow Lake again asked Runestone to discuss possible delivery of power to the Village. On October 6, 1970, Runestone informed Otter Tail of Elbow Lake's request and asked whether Runestone could negotiate to deliver power to Elbow Lake despite the fact that previous requests had been turned down on the basis of the provision in the Otter Tail-Cooperative Power Association contract. Mr. Hartl orally notified Runestone that Otter Tail would not answer its request. [GX 347, GX 348; Perino Tr. II, p. 102].

57. On March 29, 1971, Basin Electric Power Cooperative renewed its offer to sell power at wholesale to Elbow Lake at a rate higher than that offered in 1967. Basin also told Elbow Lake first to attempt to secure power at wholesale from the utility which would have to wheel Basin's power to the Village, namely Otter Tail. [GX 306].

58. Elbow Lake did not intend to build its own generating plant unless it was unable to obtain power from any other source. [Martinson Tr. I, pp. 118-119].

59. The proceeding before the Federal Power Commission commenced by Elbow Lake on March 16, 1966 to obtain an interconnection with Otter Tail is still continuing. The Commission has completed phase 1 of the proceeding and has ordered an emergency interconnection between Otter Tail and Elbow Lake's municipal electric system. Otter Tail appealed the Commission's ruling which was affirmed by the Eighth Circuit Court of Appeals in *Otter Tail Power Company v. Federal Power Commission*, 429 F. 2d 232 (8th Cir. 1970), cert. denied, 91 S. Ct. 923. On September 13, 1971, the Commission ordered Otter Tail to make a permanent interconnection with Elbow Lake.

B. *Hankinson, North Dakota*

60. Otter Tail obtained a 20 year franchise to distribute electric power at retail in Hankinson on February 16, 1931. [GX 115].

61. On May 19, 1947 the voters in Hankinson approved the establishment of a municipal electric system. [GX 2, p. 2]. No municipal system was developed and Otter Tail continued to serve the town at retail.

62. Hankinson did not renew Otter Tail's franchise when it expired on February 16, 1951. [GX 84, p. 7, Stipulation # 16].

63. On January 7, 1963 the City Council appointed a committee to investigate the feasibility of establishing a municipal electric system to serve Hankinson. [GX 311, pp. 9-10]. On August 12, 1963 the City Council retained North Central Engineers to prepare an engineering feasibility study of a municipal electric system. The report was submitted to the City Council on September 26, 1963 and concluded that a municipal electric system in Hankinson was economically

feasible. [GX 315-316; GX 311, pp. 13-15; GX 84, p. 7, Stipulation #. 19].

64. On September 30, 1963 Hankinson applied for an allocation of power from the Bureau of Reclamation. [GX 248, pp. 2-3].

65. On October 7, 1963 the City Council passed a resolution to schedule an election for October 22, 1963 to vote on the question of whether the City should issue $190,000 of electric revenue bonds to finance construction of a municipal electric system. [GX 314, pp. 2-4].

66. On October 11, 1963 Otter Tail informed the mayor of Hankinson that Otter Tail would not under any circumstances wheel power for Hankinson, for Central Power Electric Cooperative or for the Bureau of Reclamation for delivery to Hankinson, that Otter Tail would not supply wholesale or standby or supplemental power to Hankinson, and that Otter Tail would not sell its distribution system in Hankinson under any circumstances. [GX 117]. On October 15, 1963 Otter Tail told the mayor of Hankinson that the engineering feasibility report had several erroneous assumptions, including one that Otter Tail would sell power at wholesale. [GX 119].

67. On October 22, 1963 the residents of Hankinson approved the establishment of a municipal electric system by a vote of 442 to 211, and approved the issuance of $190,000 of electric revenue bonds to finance it by a vote of 440 to 213. [GX 311, pp. 16-18; GX 2, p. 2].

68. In 1963 Otter Tail owned the only subtransmission lines near Hankinson. The Bureau had a high voltage 230 kv bulk power supply transmission line approximately 39 miles from Hankinson at Forman, North Dakota. Otter Tail had a substation at Forman and two subtransmission lines running

from Forman eastward past Hankinson. One of these was a 41.6 subtransmisison line which was connected to another substation adjacent to Hankinson which stepped the voltage down for retail distribution in Hankinson. [GX 206; GX 316, pp. 6-9].

69. RSR Electric Cooperative is a distribution cooperative and a member of Central Power Electric Cooperative, a generation and transmission cooperative. In 1963 RSR had a substation located on Otter Tail's transmission line about two miles from Hankinson to which Otter Tail wheeled power pursuant to a wheeling contract between Otter Tail and Central RSR Electric Cooperative could not supply wholesale power or wheel power to Hankinson without using Otter Tail's transmission lines. [GX 206; GX 343; GX 316, p. 7; GX 41-47; Belinsky Tr. II, pp. 97-98].

70. In October 1963 Hankinson applied for an allocation of power from the Bureau. On November 5, 1963 the Bureau advised Hankinson that it would study possible methods of delivering power to the city. [GX 248-249].

71. On October 28, 1963 Hankinson asked RSR Electric Cooperative to supply power to the proposed municipal electric system. On November 19, 1963 RSR offered to deliver power to Hankinson if the town were successful in establishing its own municipal distribution system. [GX 335].

72. On November 27, 1963 Hankinson asked Otter Tail whether it would discuss the possible sale of its distribution system to the city and the termination of its existing street lighting contract with the city, and whether it would wheel power to the city. On December 4, 1963 Otter Tail advised Hankinson that it would not sell its distribution system in Hankinson, would not wheel power, and saw no reason to terminate the street lighting contract. [GX 120, GX 121].

73. On January 24, 1964 Central Power Electric Cooperative completed a study of possible methods for RSR Electric Cooperative to supply power at wholesale to Hankinson. The study concluded that the best method was to have power wheeled over Otter Tail's lines to RSR's substation near Hankinson, because construction of a 39 mile radial line to connect with the Bureau's transmission line at Forman, North Dakota would result in poor service reliability, and because the construction of transmission lines to connect with any other power supplier was not economically feasible. [GX 334].

74. On February 17, 1964 the City Council passed a resolution to hire Maeir & Tompt Engineers to design a municipal electric system. [GX 311, pp. 23-26].

75. On April 20, 1964 Allison-Williams Company, an investment banking company hired by Hankinson in connection with the expected sale of the electric revenue bonds, advised Hankinson that the bonds could not be sold until the city entered into a firm contract with a supplier of wholesale power. [GX 336].

76. On May 14, 1964 Hankinson asked RSR Electric Cooperative to serve the town at wholesale and furnish the city with a proposed contract for such service. [GX 336].

77. On May 19, 1964 RSR requested Central Power Electric Cooperative to increase its power delivery to RSR so it could supply power at wholesale at Hankinson. On May 28, 1964 Central advised RSR that it would ask Otter Tail to increase the capacity of RSR's substation near Hankinson, but that Otter Tail probably would not wheel power for RSR if it was to be used to supply power at wholesale to Hankinson. [GX 337, GX 333].

78. On May 28, 1964 Central advised Otter Tail that RSR desired to increase the capacity of its Hankinson substation and asked if this was permissible under the wheeling contract between Central and Otter Tail. [GX 122].

79. On June 8, 1964 Otter Tail asked Central whether the proposed increase in substation capacity would be used to serve Hankinson. On June 10, 1964 Central notified RSR of Otter Tail's question. [GX 123-124].

80. On June 24, 1964 RSR notified Central that the increase in substation capacity related to long range plans for service in the area and was necessary because RSR's system was overloaded. On July 14, 1964 Central forwarded this explanation to Otter Tail. [GX 338, GX 124].

81. On July 24, 1964 Otter Tail advised Central that the company suspected that RSR intended to supply power to Hankinson, and since Otter Tail served the city it would not agree to the increase in substation capacity. [GX 125].

82. On July 31, 1964 Central advised RSR that Otter Tail would not agree to increase the substation capacity if RSR used it to supply power to Hankinson, so RSR would have to make other transmission arrangements if it wanted to supply power at wholesale to Hankinson. [GX 332].

83. On July 8, 1964 the Bureau made an allocation of power to Hankinson. [GX 250; GX 214, p. 3].

84. On August 7, 1964 the Bureau asked Otter Tail to add the Hankinson load to the wheeling notice which the Bureau had sent to Otter Tail with service to Hankinson expected to commence in July 1965. [GX 251].

85. On September 30, 1964 Otter Tail advised the Bureau that Otter Tail would not wheel Bureau power to Hankinson, and that Article 27(c)(2) of the transmission agreement be-

tween the Bureau and Otter Tail limited Otter Tail's obligation to wheel only to towns which were not served at retail when the contract was signed. [GX 253].

86. On December 16, 1964 the Bureau advised Otter Tail that Article 27 specifically provided that the parties would attempt to negotiate a wheeling arrangement for any prospective Bureau preference customers, and again requested Otter Tail to wheel power to Hankinson. On March 5, 1965 Otter Tail responded to this request by repeating its refusal to use its transaction lines to serve a town already receiving service from Otter Tail. [GX 254-255].

87. On January 6, 1965 Hankinson's City Attorney met with Otter Tail officials and Otter Tail's attorney to discuss the methods of delivering power to the proposed municipal system in Hankinson then being considered by the city. Otter Tail indicated that the Bureau-Otter Tail transmission contract limited Otter Tail's obligation to wheel only to towns which were not served at retail when the contract was signed in 1955, and that the transmission agreement between Otter Tail and Central Power Electric Cooperative was not intended to permit Central to take away an existing customer of Otter Tail. Otter Tail's attorney stated that the fact that Hankinson had become a member of Basin Electric Power Cooperative had no significance because there was no way to transmit power from Basin to the town. He further noted that the Bureau could not build a transmission line to serve Hankinson because it would require a congressional appropriation and was economically impractical, and that the Rural Electrification Administration was prohibited by law from loaning money to a cooperative to build a line to serve a town already receiving central station service. [GX 126-127].

88. On February 23, 1965 Hankinson's Bond Counsel advised the mayor that he could not issue a legal opinion necessary to sell the revenue bonds, because Otter Tail's refusal to wheel prevented the town from obtaining power which would be the source of revenue for the municipal system. He also noted the possibility of litigation with Otter Tail which would prevent sale of the bonds. [GX 357].

89. On March 29, 1965 Central Power Electric Cooperative advised Otter Tail that RSR Electric Cooperative had entered into a contract to sell power at wholesale to Hankinson, and asked whether Otter Tail would wheel the additional amount of power to RSR's substation near Hankinson. Central noted that Otter Tail had previously stated that it had sufficient transmission capacity in its lines to transmit the power to RSR's substation. [GX 331, p. 2; GX 128].

90. On April 14, 1965 Otter Tail advised Central that Otter Tail would not wheel power to enable RSR to take away a town being served by Otter Tail. [GX 294].

91. On April 30, 1965 Central's manager notified his board of directors that the Rural Electrification Administration would not approve a long term contract for RSR to supply power at wholesale to Hankinson. On November 26, 1965 the Rural Electrification Administration informed RSR that it could not approve the proposed wholesale contract with Hankinson because there was no way to deliver power to the town. [GX 330; GX 342].

92. On August 2, 1965 the City Council unanimously passed a resolution to purchase from the Bureau the power allocated to the city, to request the Bureau to build a 39 mile transmission line from its nearest substation at Forman, North Dakota, and to request the Bureau to increase the allo-

cation of power to the city. The resolution noted that Otter Tail had refused to wheel power to the city and that the REA had disapproved the proposed contract for RSR Electric Cooperative to sell power at wholesale to Hankinson. [GX 311, pp. 27-28; GX 312].

93. On August 12, 1965 Hankinson asked Otter Tail to provide information as to wholesale sales by Otter Tail to municipal systems, and asked whether Otter Tail would negotiate with the city regarding a wholesale sale. On August 16, 1965 Otter Tail advised Hankinson that it would not negotiate to make a wholesale sale to the city. [GX 129-130].

94. On October 14, 1965 the Bureau advised Hankinson that it was impractical for the Bureau to build a 39 mile transmission line from Forman to Hankinson, and that the Bureau's power commitment to the city was contingent upon arranging transmission of the power to the city. [GX 256].

95. On January 5, 1966 Hankinson filed a complaint with the North Dakota Public Service Commission seeking to compel Otter Tail to provide wholesale service and to wheel power to the city. On December 30, 1966 the Commission ruled that it lacked jurisdiction to grant the relief requested. [GX 131; GX 140].

96. On February 1, 1966 Hankinson filed a complaint with the Federal Power Commission seeking an order to compel Otter Tail to wheel power to the town. [GX 132].

97. On July 25, 1966 Roy P. Anderson, and others, filed a complaint in the state court against Hankinson and the City Council to enjoin the Council from spending city funds for the proposed municipal electric system (hereinafter referred to as the "Taxpayers Suit"). The complaint alleged, *inter alia*, that (1) expenditure of funds by the City Council to establish a

municipal electric system was illegal, because state law prohibited a municipality from paying for a municipal electric system with funds obtained by taxation, and (2) expenditure of funds by the City Council to compel Otter Tail to sell power at wholesale or wheel power to Hankinson was illegal, because state law prohibited a municipality from leasing transmission facilities without first obtaining the permission of the electorate. [GX 133].

98. Otter Tail employees met with the Taxpayers Committee which brought the aforesaid lawsuit against Hankinson and stated that Otter Tail would absorb legal expenses incurred by the Committee. Otter Tail paid approximately $1,500 of the attorney's fees for the lawsuit against Hankinson and the subsequent appeal to higher courts. [Hartl Tr. VIII: pp. 90-91; Nygard Depo. GX 289, pp. 34-35].

99. The court in the Taxpayers Suit issued a temporary restraining order against Hankinson but this was vacated on August 25, 1966, because plaintiffs had not presented the requisite bond. On October 14, 1966 the court issued a temporary injunction and on January 27, 1967 the court issued a permanent injunction enjoining the city from spending any city funds for a municipal electric system. [GX 134-138].

100. Hankinson appealed the trial court's ruling, and on April 3, 1968, the North Dakota Supreme Court reversed the trial court, dissolved the permanent injunction and dismissed the action. [GX 139].

101. The Taxpayers Suit delayed establishment of the proposed municipal electric system over a year and a half.

102. On July 15, 1968, by a 4-3 vote, the Hankinson City Council voted to dismiss the city's complaint against Otter Tail filed with the Federal Power Commission and to dismiss

the civil antitrust suit the City had filed against Otter Tail in federal district court in North Dakota. [GX 311, p. 40; GX 84, Stipulation #29].

103. On August 5, 1968 Otter Tail made an offer of settlement to the Hankinson City Council. Otter Tail offered to pay Hankinson for all unpaid attorney's fees owed by the city, all electrical engineering fees incurred by the city relating to the municipal electric system, and any litigation expense the city might incur in determining the amount of these fees, on condition that the City grant Otter Tail a ten year franchise to serve the City. [GX 141; GX 84, Stipulation #28].

104. Hankinson accepted Otter Tail's settlement offer, awarded Otter Tail a 10 year franchise effective on September 4, 1968, and notfied the Bureau that the City no longer needed its allocation of power. [GX 311, pp. 42-43; GX 84, Stipulation #29; GX 257].

C. *Colman, South Dakota*

105. Otter Tail had distributed electric power at retail in Colman since 1941 when Otter Tail acquired the distribution system by merger with another company. [GX 84, p. 12—Stipulation #30].

106. Otter Tail's franchise to distribute electric power at retail in Colman expired on October 31, 1959 and was not renewed by the town. [GX 144; GX 84, p. 12—Stipulation #31].

107. In 1959 Colman applied for and received an allocation of 500 kilowatts of power from the Bureau of Reclamation. [GX 214, p. 5; GX 310, p. 5].

108. On December 11, 1959, Colman retained Buell & Winter Engineering Company to prepare an engineering feasibility study of a municipal electric system in Colman. [GX 309, p. 1; GX 84, p. 12—Stipulation #34].

109. On January 29, 1960, Buell & Winter asked Otter Tail's local district manager whether Otter Tail would sell its retail distribution system to Colman and would sell power at wholesale to the city. After discussing the request with the general office, the district manager on February 5, 1960 advised the Mayor of Colman that Otter Tail would not sell its distribution system, and that Otter Tail was primarily in the retail distribution business, but did make some wholesale sales of power. [GX 145, GX 146, GX 147].

110. On March 15, 1960, Buell & Winter asked Northern States Power Company (NSP), whether it would sell power at wholesale to Colman. NSP had a transmission line some 4 or 5 miles from Colman. On March 25, 1960, NSP informed the Mayor of Colman that it could not offer to sell power at wholesale to Colman, because the city was outside of NSP's service area and was being supplied with electric power at retail by Otter Tail. [GX 300; GX 301; Spethmann Tr. II, p. 5].

111. On April 5, 1960 Buell & Winter submitted its engineering report which concluded that a municipal electric system in Colman was economically feasible. [GX 309].

112. On August 2, 1960, Colman's City Attorney asked Otter Tail whether it would sell its local distribution system to Colman. On August 3, 1960, Otter Tail declined to sell its distribution system to Colman. [GX 148; GX 149].

113. On November 21, 1960, the City Council passed Ordinance #48 which provided for the construction of a municipal electric system and the issuance of $95,000 of electric revenue bonds to finance it, and scheduled a special election to vote on the Ordinance for December 13, 1960. [GX 310, p. 14]. At the special election the voters approved Ordinance #48 to estab-

lish a municipal electric system by a vote of 229 to 53. [GX 310, p. 15; GX 84, p. 13—Stipulation #39].

114. On May 1, 1961, the City Council passed a resolution authorizing sale and delivery of the $95,000 of electric revenue bonds and set June 1, 1961 as the date for receipt of bids on the bonds. [GX 310, p. 17].

115. On May 8, 1961, the City Council set June 15, 1961 as the date for receipt of bids to construct the municipal electric system. [GX 310, p. 18].

116. On May 29, 1961, Otter Tail and Eugene Fritz, a resident of Colman and an employee of Otter Tail, filed a lawsuit in the local circuit court against Colman seeking to enjoin the city from negotiating and selling the electric revenue bonds, from establishing a municipal electric system, and from awarding any contracts for the construction of the municipal electric system. [GX 150; Hartl Depo. GX 287, pp. 180-81].

117. On June 1, 1961 two investment banking institutions submitted bids to purchase the electric revenue bonds, but Otter Tail's lawsuit made it impossible to accept a bid and consummate the sale. [GX 310, p. 19]. On June 15, 1961, six construction companies submitted bids to construct the municipal electric system and the City Council accepted the lowest bid of Knox Construction Company. On June 24, 1961, Colman notified Knox Construction Company that it had to reject the company's bid because of the pending lawsuit brought by Otter Tail. [GX 310, p. 20; GX 308].

118. On June 15, 1961, Otter Tail and Eugene Fritz filed an amended complaint in the lawsuit against Colman alleging, *inter alia*, that (1) Ordinance #48 was void because certain pre-election requirements had been disregarded; i.e., sufficient notice of the election; (2) the sale of revenue bonds

would be illegal, because there was no assurance that the municipal system could be constructed and operated within the authorized amount of $95,000; (3) the sale of bonds would be illegal due to material variances between the language of Ordinance #48 and the language of the bond resolution; and (4) the engineer's plans and specifications did not form a proper basis for competitive bidding. [GX 151].

119. On October 21, 1961, the trial court dismissed Otter Tail's complaint against Colman and on January 15, 1962 Otter Tail filed notice of appeal to the Supreme Court of South Dakota. [GX 152; 153].

120. On November 27, 1962, the Mayor of Colman advised the Bureau that Colman expected to utilize its allocation of firm power within 12 months, and on February 11, 1963 the bureau advised Colman that its allocation of 500 kilowatts was being held for the town. [GX 237].

121. On May 9, 1963, the Supreme Court of South Dakota unanimously ruled in favor of Colman and specifically ruled that the election approving Ordinance #48 was not invalid, and held that a validating act passed by the South Dakota Legislature in 1961 cured whatever procedural irregularities, if any, had occurred. The 1961 Validating Act had been passed by the South Dakota Legislature before Otter Tail filed its complaint on May 29, 1961 although the Act actually went into effect on July 1, 1961. [GX 154; Holten Tr. III, 18-19; the decision is reported in 121 NW 2d 483 (1963)]. Otter Tail's lawsuit against Colman delayed the establishment of the municipal electric system in Colman for two years.

122. On June 14, 1963, Colman's bond counsel advised the City Attorney that before the revenue bonds could be sold, Colman would have to furnish a certificate stating that no litigation was pending. [GX 365].

123. On July 11, 1963, a group of Colman citizens filed with the City Council an initiative petition calling for an election to repeal Ordinance #48 which authorized issuance of revenue bonds and construction of the municipal electric system. [GX 160, GX 310, p. 26].

124. On or about July 18, 1963, Otter Tail began to replace many of its existing poles in the city with taller poles. Otter Tail did not consult with or notify the city officials in Colman prior to installation of the taller poles in the town. Since the new municipal electric distribution system had to be constructed next to Otter Tail's existing distribution system which it refused to sell to the town, the new distribution system would either have to be put underground or built higher than Otter Tail's existing system in order to meet the clearance requirements of the Electrical Safety Code. [Nye Depo. GX 288, pp. 16-17, 21-22]. This would increase the cost of constructing the new system. On July 20, 1963 Colman filed a lawsuit against Otter Tail seeking to enjoin Otter Tail from continuing with its pole replacement program in Colman. At the time of the court hearing, Otter Tail discontinued installation of the taller poles so no written injunction was granted. [GX 155; Nye Depo. GX 288, pp. 23-24].

125. On July 30, 1963, the City Council passed a resolution refusing to act on the initiative petition, and approved the new plans and specifications prepared by Buell & Winter Engineering Company. [GX 310, pp. 26-27].

126. On August 6, 1963, three of the citizens who signed the initiative petition filed an application in the local circuit court for a writ of mandamus against the City Council of Colman, seeking to compel the Council to schedule an election on an ordinance to repeal the approval of the municipal elec-

tric system. [GX 161]. Employees of Otter Tail suggested the initiative petition procedure to the citizens in Colman who signed it. Otter Tail drafted the initiative petition and the subsequent action for a writ of mandamus. Otter Tail's attorneys actively participated in the legal proceedings involved including the subsequent appeal to the Supreme Court of South Dakota, and Otter Tail absorbed all the legal expenses incurred in the proceedings. [GX 161-162; Brewer Depo. GX 291, pp. 15-16].

126. On August 13, 1963, Colman's bond counsel advised the city attorney that even though the mandamus proceeding was not, in his opinion, meritorious, the litigation made it impossible for the city to deliver the no-litigation certificate which was required before the bonds could be sold. [GX 367].

127. On September 3, 1963, three companies submitted bids to construct the municipal electric system, but the pending mandamus proceeding prevented the city from awarding the construction contract and selling the electric revenue bonds. [GX 310, pp. 29-31].

128. On September 9, 1963, the circuit court denied the application for a writ of mandamus, holding that the power to initiate an ordinance rescinding a previous bond election was created by legislation passed subsequently to the election wherein Ordinance #48 was approved and, since the general rule is that legislation operates only prospectively, the City Council of Colman had no power to submit the proposed ordinance to a vote of the electors. [GX 162-63].

129. On September 14, 1963, Colman's city attorney notified Colman's bond counsel that the writ of mandamus had been denied and that two of the three petitioners had asked to be withdrawn from the mandamus proceeding. He noted that

there was a four month period within which to appeal the trial court's decision and asked whether the revenue bonds could be sold during this period. Bond counsel advised him that the bonds could not be sold until the litigation had finally ended. [GX 368, 369].

130. On November 13, 1963, petitioners filed an appeal to the South Dakota Supreme Court in the mandamus proceeding. [GX 164].

131. On September 8, 1964, the Supreme Court of South Dakota unanimously affirmed the circuit court and denied the writ of mandamus. The Court ruled that the election wherein the Colman electors "emphatically and irrevocably" approved Ordinance #48 was "valid and non-rescindable", since it occurred more than six months prior to the passage of the legislation enabling, under certain instances, municipalities to rescind previous bond elections. [GX 165—Decision reported in 130 NW 2d 109 (S.D. 1964)]. The initiative petition and the subsequent mandamus proceeding delayed establishment of the municipal electric system in Colman for over a year.

132. On September 14, 1964, Otter Tail's Division Manager-East proposed to the City Council that, in exchange for a new franchise to distribute electric power to Colman, Otter Tail would absorb all the costs which the city had incurred in connection with the proposed municipal system, including engineering, legal and advertising expenses, would establish a three man area line crew in Colman, would build a new garage in Colman, and would rebuild and modernize the Otter Tail distribution system in Colman. [GX 171; GX 179-G]. In October, 1964, the Council rejected the proposal. [GX 310, p. 34].

133. On September 21, 1964 a petition for rehearing was filed with the South Dakota Supreme Court in the mandamus

proceeding, but it was denied by the Court on October 9, 1964. [GX 166-167].

134. On September 21, 1964 the City Council passed a resolution accepting the bid of Gefke & Co. to purchase the $95,000 of electric revenue bonds and passed a resolution approving the plans and specifications for construction of the municipal electric system and set October 22, 1964 as the date for receipt of construction bids. [GX 310, pp. 32-33].

135. On October 22, 1964 the City Council received bids from three companies to construct the municipal electric system and accepted the low bid of E. A. Pedersen Company. [GX 310, pp. 35-36].

136. On or about June of 1965 the construction of the municipal electric system had been completed and was in operation. Otter Tail dismantled and removed its retail distribution system in Colman. [GX 84, p. 15, Stipulation #45].

137. The Colman municipal electric system receives power at wholesale from the Bureau of Reclamation and the power is wheeled to the town by East River Electric Cooperative and Sioux Valley Empire Electric Association. [GX 84, p. 15—Stipulation #44].

D. *Aurora, South Dakota*

138. Otter Tail obtained a renewal of its franchise to supply electric power at retail in Aurora, South Dakota on November 28, 1951 for a 10 year term. [GX 180; GX 2, Schedule A, p. 2]. Aurora did not renew Otter Tail's franchise when it expired on November 28, 1961. [GX 2, Schedule A, p. 2].

139. On March 26, 1963 Aurora retained the consulting engineering firm of Smith & Sheen in Watertown, South Dakota to conduct a study of the feasibility of a municipal electric system in Aurora. [GX 139, p. 1].

140. On April 18, 1963, Mr. P. N. LaTourette, the local District Manager of Otter Tail, informed Smith & Sheen that Otter Tail would not sell its distribution system to Aurora, would not sell power at wholesale and would not wheel Bureau power to the town. [GX 182].

141. On August 12, 1963 the Town Board adopted Ordinance #40 calling for the establishment of a municipal electric system and the issuance of revenue bonds to finance it and scheduled a special election on the Ordinance for September 10, 1963. [GX 318, pp. 21-24]. At the special election on September 10, 1963 the citizens of Aurora voted against the municipal electric system by a vote of 56 "Yes" and 57 "No." [GX 218, pp. 25-26; GX 2, p. 1].

142. Aurora applied for and received an allocation of power from the Bureau of Reclamation on July 8, 1964. [GX 214].

143. In April, 1965, Smith & Sheen submitted a revised feasibility report which concluded that a municipal electric system was feasible in Aurora. [GX 320].

144. On April 12, 1965, the Town Board of Aurora adopted Ordinance #44 for the establishment of a municipal electric system and the issuance of $40,000 of revenue bonds to finance it and scheduled a special election for May 18, 1965. [GX 318, pp. 32-35]. At the special election on May 18, 1965, the citizens of Aurora approved a municipal electric system by a vote of 86 to 36. [GX 318, pp. 36-37; GX 2, p. 1].

145. On June 4, 1965, the Town Board passed resolution #9 for sale of the $40,000 of revenue bonds to finance construction of the municipal electric system, and authorized the town Clerk to publish notices for bids on the sale of bonds to be received by the Board on June 28, 1965 and for bids for

construction of the system to be received by the Board on July 6, 1965. [GX 318, pp. 38-45].

146. On June 25, 1965, Otter Tail and three Aurora residents jointly filed a complaint seeking to enjoin the Town Board from selling the bonds or proceeding with construction of the proposed municipal system. [GX 186]. The complaint alleged that the proceedings relating to construction of a municipal system and sale of revenue bonds were illegal for the following reasons: (1) there were material variances between Ordinance #44 approving construction of the municipal system and the resolution passed by the town board which described the terms for the sale of the revenue bonds; (2) the "Anti-Competition Clause" required to be contained in the revenue bonds could not be fully complied with because Aurora was required by contract to purchase its municipal electric services from Otter Tail until December 5, 1970; (3) the election approving Ordinance #44 was invalid in that the date of the election was not in accord with the State statutes and constitution; (4) sale of the revenue bonds would be illegal until it could be determined whether the municipal system could be constructed within the authorized amount of the proposed revenue bonds; and (5) the specifications for construction of the municipal system were improper and illegal and did not furnish a proper legal basis for competitive bidding. [GX 186].

147. On June 28, 1965, the Town Board received one bid from the Brookings International Life and Casualty Company for $17,500 of the revenue bonds. The Board rejected this bid because it included only part of the proposed $40,000 issue. [GX 318, p. 46].

148. On July 6, 1965, the Board passed resolution #10 which rescinded resolution #9, resolution #11 which prescribed new terms and covenants for the sale of revenue bonds, resolution #12 which provided for the sale of $40,000 of revenue bonds and resolution #13 which authorized Aurora to bid on its own revenue bonds. [GX 318, pp. 47-49].

149. On July 6, 1965, the Board opened the two bids received for construction of the municipal electric system: Stake Construction Co. in Lennox, South Dakota for $41,001.65 and Lund Line Construction Co. in Selby, South Dakota for $29,925.75. On August 2, 1965, the Town Board awarded the construction contract to Lund Line Construction Company. [GX 318, pp. 59-60, 62].

150. On August 2, 1965, the Town Board received two bids on the new resolution for sale of the $40,000 of revenue bonds: one from The Brookings International Life and Casualty Company for $20,000 and one from the Town of Aurora itself for the remaining $20,000 to be purchased from its own surplus funds. The Town Board accepted both bids and authorized the Town Clerk to have the revenue bonds printed and prepared for issuance. [GX 318, pp. 61-64].

151. On August 10, 1965, Otter Tail and three Aurora residents jointly filed an amended complaint seeking to enjoin sale of the bonds and commencement of construction. The complaint alleged additional grounds for invalidating the proceedings relating to construction of the municipal system and sale of revenue bonds, including allegations that (1) Resolution No. 13 authorizing the Town to bid on its own revenue bonds was invalid because it was *ultra vires* and contrary to the terms of Ordinance No. 44; (2) there were factual variances between Resolution No. 12 which provided for sale of $40,000

of revenue bonds and Resolution No. 11 which specified the terms of sale of the bonds; and (3) the Town Board was legally required to reject certain received bids relating to the construction of the system. [GX 188].

152. On August 19, 1965, Otter Tail was granted an interlocutory injunction, thereby halting proceedings to establish the municipal electric system. [GX 189 and GX 191].

153. On January 16, 1967, the trial court held that (1) Otter Tail had no standing to sue in the aforesaid proceeding, (2) that the election wherein Ordinance No. 44 was approved was valid and legal and (3) that the Town of Aurora could not buy its own revenue bonds. [GX 192 and GX 193].

154. On September 6, 1967, the Town Board retained Ehlers and Associates, a financial consultant firm, to assist in marketing the $40,000 of revenue bonds. [GX 318, p. 64]. On December 29, 1967 Ehlers informed Aurora that several factors, including the threat of another lawsuit by Otter Tail, prevented sale of the electric revenue bonds. [GX 325].

155. On January 29, 1968, Aurora accepted the bid of D & G Investment Company to purchase the $40,000 of revenue bonds. [GX 318, p. 71].

156. On February 5, 1968, the Town Board directed the town Clerk to publish a notice for construction bids to be received on March 4, 1968. [GX 318, p. 76].

157. On February 28, 1968, eight residents of Aurora filed with the Town Board an initiative petition asking for a referendum to repeal Ordinance #44 which authorized the issuance of revenue bonds and construction of the municipal electric system which had been previously approved by the voters on May 18, 1965. [GX 195].

158. On March 4, 1968 the Town Board rejected the initiative petition and accepted the bid of Lund Line Company to construct the municipal electric system. [GX 318, pp. 77-79].

159. On March 7, 1968 the signers of the initiative petition requested a writ of mandamus from the local circuit court to require the Town Board to show cause why they should not submit the referendum sought by the initiative petition to a vote of the citizens. On March 8, 1968, the Circuit Court issued a show cause order. [GX 196, GX 197].

160. Representatives of Otter Tail suggested the initiative petition procedure to the citizens in Aurora who signed it. Otter Tail attorneys drafted the initiative petition and the subsequent action for a writ of mandamus. Otter Tail's attorneys actively participated in the legal proceedings involved, and Otter Tail absorbed all the legal expenses incurred in the proceedings. [GX 196; GX 197; Brewer Depo. GX 291, pp. 5-8; Hartl Depo. GX 287, p. 167].

161. On March 25, 1968, the Town Board, after it was served with the writ of mandamus, scheduled a special election for April 16, 1968 on the referendum to repeal approval of the municipal electric system. [GX 318, p. 83]. At the election on April 16, 1968, the referendum to repeal approval of the municipal electric system was defeated by a vote of 36 Yes and 105 No. [GX 318, pp. 84-85; GX 2, p. 1].

162. On April 19, 1968, the Town Board executed a construction contract with Lund Line Company which proceeded to build the municipal distribution system. [GX 318, pp. 84-85].

163. On or about June 1, 1967, George Danforth, bond counsel for the Town of Aurora, informed W. R. McCann, attorney for Aurora, that the revenue bonds could not be sold

until all litigation and appeals were over because a no-litigation certificate was necessary in order to market the bonds. [GX 352].

164. The municipal electric system in Aurora began operation in July 1968. [GX 318, p. 87; GX 2, Schedule A, p. 4].

165. Aurora's municipal electric system purchases power at wholesale from the Bureau of Reclamation. The power is wheeled to the town by East River Electric Cooperative and Sioux Valley Empire Electric Association. [Waples II: pp. 79-81; GX 245; GX 246; GX 84, Stipulation 59].

166. The lawsuit brought by Otter Tail on June 25, 1965 and the subsequent initiative petition and mandamus proceeding sponsored and paid for by Otter Tail delayed establishment of the municipal electric system in Aurora for approximately three years. [GX 244, GX 323, GX 326, GX 328].

E. *Finley, North Dakota*

167. Otter Tail's franchise from the City of Finley expired in 1958 and was not renewed. [GX 84, Stipulation #62].

168. On April 4, 1960 the voters approved the construction of a new municipal electric system by a vote of 189 to 166. The ballot in this election, however, did not contain a submission of the question of issuing revenue bonds to finance construction of the proposed municipal system. [GX 84, Stipulation #69; GX 2, p. 2].

169. In June 1964 the City Council retained an engineer to prepare a feasibility study of a municipal electric system; and in September 1964 the engineer submitted a report to the City Council which concluded that a municipal electric system in Finley was economically feasible. [GX 84, Stipulation #65; GX 292-J; 292-K].

170. Finley is located in an area where electric suppliers other than Otter Tail could economically wheel power to a municipal system in the town. [GX 292-K; GX 206].

171. On November 17, 1964 the voters of Finley voted against the establishment of a municipal electric system, and Otter Tail continues to serve the town at retail. [GX 84, Stipulation #69; GX 2, p. 2].

172. Prior to the election on November 17, 1964 Otter Tail stationed a new three man area line crew in Finley to improve service in the town. [GX 378, p. 5; Nygard Depo. GX 289, pp. 25-26].

F. *Velva, North Dakota*

173. On March 8, 1967 Velva informed Otter Tail that the city would not renew Otter Tail's franchise when it expired on June 3, 1967. [GX 419].

174. In January 1968 an engineering report was submitted to the town which concluded that a municipal system would be economically feasible in Velva. [DX 88].

175. Velva is located in an area where electric suppliers other than Otter Tail could economically wheel power to a municipal electric system in the town. [DX 93].

176. A group of Velva citizens in favor of a municpal electric system petitioned the city council to submit the question of whether Otter Tail should be granted a new franchise to a vote and the question was put on the ballot for the regular city election scheduled for April 2, 1968. [GX 184].

177. Prior to the election Otter Tail stationed a new area line crew in Velva to improve service in the town. [GX 421, p. 3], and agreed to enter into a new municipal service contract with Velva which reduced the number of hours during which Otter Tail charged the highest rate for municipal pumping and other incidental uses. [GX 423, par. 11].

178. At the election on April 2, 1968 the electorate voted to grant Otter Tail a new franchise by a vote of 346 to 215. [GX 184].

179. In August 1968, Otter Tail installed new mercury vapor lights in Velva for which Otter Tail charged the town a rate lower than Otter Tail's existing rate for a one year trial period. [GX 424].

G. *Municipal Power Elections in Other Towns Served at Retail by Otter Tail.*

180. From 1945 through 1970 there have been elections on the question of establishing a municipal electric system in 12 towns served at retail by Otter Tail, including Aurora, Colman, Elbow Lake, Hankinson, Finley and Velva. [GX 2, pp. 1-3].

181. The other six towns in which there were municipal power elections were Britton, South Dakota; Crookston, Minnesota; Milbank, South Dakota; Minneota, Minnesota; Walhalla, North Dakota; and Wheaton, Minnesota. There were a total of 11 elections on the municipal power issue in these six towns at various times, all prior to 1955, and Otter Tail won at least five of them. None of these towns established municipal electric systems. [GX 2, pp. 1-3].

H. *Towns Which Have Discontinued Receiving Electric Power at Retail from Otter Tail.*

182. Since 1945 nine towns have discontinued receiving electric power at retail from Otter Tail. [GX 2, p. 3]. Three towns—Georgetown, Minnesota, White Spur and Woodworth, North Dakota—were sold voluntarily by Otter Tail to rural electric cooperatives who were able to provide better service to the towns. [GX 84, Stipulations #84-106]. Three towns—Dakota City, Sanish and Van Hook, North Dakota—went out

of existence. [GX 84, Stipulations #73-76, 81-83]. Three towns—Colman, Aurora and Elbow Lake—established municipal electric systems. [GX 84, Stipulations #1-14, 30-45, 46-60].

IV. RELEVANT MARKET

A. *Product Market*

183. The relevant product market is the sale of electric power at retail.

B. *Geographic Market*

184. Otter Tail sells electric power at retail in 465 towns in its three-state service area. [DX 95, Schedule 1]. Otter Tail provides retail service in these 465 towns pursuant to non-exclusive franchises awarded by the towns to Otter Tail which grant Otter Tail the right to construct, install and maintain an electric distribution system in the towns for periods varying from 10 to 20 years. [Hartl Dep. GX 287, p. 19]. Otter Tail also distributes electric power at retail to certain farms and other rural loads located outside the corporate limits of these 465 towns, but these rural customers comprise less than 10% of the total retail customers served by Otter Tail. [GX 2, p. 8]. The sale and distribution of electric power at retail in the 465 towns is Otter Tail's principal source of electric revenue. In 1970 Otter Tail received $31,065,517 from the distribution of electric power at retail in these towns and limited rural areas. This comprised approximately 91% of Otter Tail's total electric revenues of $34,153,292. [DX 95, Schedules 1 and 5].

185. Each town served at retail by Otter Tail constitutes a separate relevant geographic market.

(a) Otter Tail distributes electric power at retail in each municipality pursuant to a franchise granted by the municipality for a limited period of time. Otter Tail operates and maintains a separate distribution system in each municipality in which it distributes electric power at retail. [GX 85, GX 115, GX 144, GX 180; Hartl Dep., GX 287, pp. 17-19].

(b) Otter Tail is generally the sole supplier of electricity at retail in municipalities it serves at retail, so it controls 100% of each such market.

i. Otter Tail was the sole supplier of electricity at retail in Elbow Lake, Minnesota, before the town established a municipal electric system. [Nye IX; p. 92].

ii. Otter Tail is the sole supplier of electricity in Hankinson, North Dakota. [Nye Tr. IX; p. 91].

iii. Except for a very few customers, Otter Tail was the only supplier of electricity at retail in Colman and Aurora, South Dakota. [Nye Tr. IX; pp. 102, 103].

186. Otter Tail supplies power at retail only in those areas of Minnesota, North Dakota and South Dakota where Otter Tail has transmission lines and distribution facilities. The Otter Tail service area corresponds generally with the outer limits of Federal Power Commission Supply Area No. 26. [DX 94; Nye Tr. IX-83]. Otter Tail does not serve customers at retail outside of Federal Power Commission Supply Area No. 26. [Nye Tr. IX-83].

187. Otter Tail distributes electric power at retail in approximately 75.6% of the towns located in its service area.

(a) Otter Tail distributes electric power at retail in 465 municipalities within its service area. [DX 95, Schedule 1].

(b) Municipal electric utilities sell electric power at retail in 45 towns located within Federal Power Commission Supply Area No. 26. [DX 94, Schedule B].

(c) Rural electric cooperatives sell electric power at retail in 105 municipalities within Federal Power Commission Supply Area No. 26. [DX 98].

188. Otter Tail distributes electric power at retail in approximately 91% of the towns located in its service area if the 105 towns served at retail by rural electric cooperatives are not included in the relevant market. Rural electric cooperatives do not compete with Otter Tail to serve at retail any towns in which Otter Tail is the existing retail supplier.

(a) The rural electric cooperatives do not attempt to obtain and do not compete for the retail distribution of power in towns served by Otter Tail. Since 1945 rural electric cooperatives have taken over retail distribution of electric power in only three towns formerly served at retail by Otter Tail. In each of these three towns—Woodworth, North Dakota; Georgetown, Minnesota and White Spur, North Dakota—Otter Tail voluntarily sold its distribution systems to the cooperatives because the towns were located in isolated portions of Otter Tail's service area and the cooperatives were in a position to provide more reliable service to the towns. [GX 84: Stipulations 84-106].

(b) The Rural Electrification Act does not permit the lending of funds so as to permit a cooperative to provide electric power to towns which are already receiving central station service. [7 U.S.C. §904]. The 465 towns in which Otter Tail sells power at retail and the 45 towns in the Otter Tail service area which receive power at retail from municipal electric utilities are all currently receiving central station service.

(c) The Rural Electrification Act does not permit the lending of funds so as to permit cooperatives to provide service to towns which have 1500 or more inhabitants. [7 U.S.C. §904; 913]. Otter Tail sells power at retail to 28 towns with 1500 or more inhabitants. [Ans., Part II, p. 2].

(d) Rural electric cooperatives did not compete with Otter Tail to sell power at retail in Hankinson, Elbow Lake, Colman and Aurora. The Sioux Valley Electric Cooperative agreed to wheel Bureau power to Colman and Aurora. [GX 84: Stipulations 44 and 59]. The REA administrator would not approve the sale of power at wholesale to Hankinson by RSR Electric Power Cooperative. [GX 330].

(e) The bulk of farms and other rural customers outside of the corporate limits of municipalities in Otter Tail's service area are supplied with retail power by rural electric cooperatives. Otter Tail does not compete to provide retail service to rural loads being served at retail by rural electric cooperatives. [Nye Tr. IX: pp. 88, 89].

189. The competition for the sale of electric power at retail in towns is generally for the entire retail load located within the corporate limits of the town, and such competition is generally between Otter Tail and a proposed or existing municipal electric utility.

(a) In a limited number of towns which Otter Tail serves at retail, including Hankinson, Elbow Lake, Colman and Aurora, a proposed municipal electric utility competed with Otter Tail for the sale of power at retail in the town. [GX 84: Stipulations 7, 8, 23, 40, 41, 55 and 56].

(b) In six towns which a municipal electric utility served at retail, including Fergus Falls, Minnesota, Otter Tail competed with a municipal electric utility for the sale of power

at retail in the town, and in all six towns Otter Tail succeeded in obtaining a franchise to serve the towns at retail. (Hartl Dep., GX 287, pp. 128-130; GX 2, p. 4].

190. The Bureau of Reclamation sells power to municipal electric systems only at wholesale, and does not sell power at retail in any town in the Otter Tail service area. [Muller Dep. GX 204A, pp. 23, 25].

191. The towns served at retail by Northern States Power Company (hereinafter NSP) in Federal Power Commission Supply Area No. 26 are not part of the relevant market.

(a) NSP is an investor owned utility which distributes electric power at retail in some municipalities located within Federal Power Commission Supply Area No. 26. [DX 94].

(b) NSP defines its service area to encompass only those areas where it has distribution facilities to supply retail customers. [Spethmann Tr. II: p. 5].

(c) NSP and Otter Tail do not attempt to obtain and do not compete for the retail distribution of electric power in municipalities served by the other. [Nye Tr. IX: pp. 85-87; Spethmann Tr. II: pp. 5-6].

192. Governmental installations located in Federal Power Commission Region No. 26 should not be included in the relevant market.

(a) There are 13 state and federal governmental installations in Federal Power Commission Region No. 26 which purchase power from the Bureau of Reclamation as preference customers. [DX 94, Sch. D].

(b) The electric power supply for each of the 13 installations is arranged pursuant to negotiations between the state or federal officials and power suppliers, and the utility which supplies electric power at retail to the adjacent town

must compete with other power suppliers for sales to the government installations. [Hartl Tr. VIII; p. 27].

(c) The Bureau has not competed with Otter Tail to provide retail electric service to towns. [Muller Dep., GX 204A, pp. 23-24]. In Hankinson, Elbow Lake, Aurora and Colman the Bureau offered to sell power only at wholesale to municipal electric systems as preference customers, and the municipal systems proposed to sell the power at retail in the towns.

193. The relevant market does not include rural loads served at retail in the Otter Tail service area.

(a) Rural loads encompass sales at retail to farms and other customers located outside corporate limits of towns. [7 U.S.C. 913].

(b) Otter Tail does not compete with rural electric distribution cooperatives to serve rural loads. [Nye Tr. IX: p. 89].

(c) The purpose of the Rural Electrification Act is to provide retail service to rural loads. [7 U.S.C. §902].

194. Otter Tail has constructed an extensive transmission network in its service area to deliver power to the 465 towns it serves at retail. [Ans., part I].

V. DOMINANCE IN TRANSMISSION

195. There are three functionally distinct types of electric power lines.

(a) "Bulk power supply transmission" refers to electric power lines which are used to move large blocks of power from generating facilities to principal load centers. [Trommershausen—Tr. V: p. 41]. A bulk power supply transmission network cannot be used to deliver power directly to

the ultimate consumers. [Trommershausen—Tr. V: p. 41]. This type of electric power line generally has a voltage of 115 KV or greater. [Trommershausen—Tr. V: p. 39].

(b) "Subtransmission" consists of electric power lines whose function is to move power from the bulk power supply transmission network to the local retail distribution systems. [Trommershausen—Tr. V: pp. 40-43]. Subtransmission lines generally have voltages ranging from 69 KV to 34.5 KV. [Trommershausen—Tr. V: pp. 40-43]. The subtransmission lines interconnect with the bulk power supply transmission network at various substations where transformers step the power down from the high voltage level of the bulk power supply system to the lower subtransmission voltages. The subtransmission lines then move the power to other substations and transformers located near the ultimate retail load which step the power down to the voltage level of the distribution system. [Trommershausen—Tr. V: pp. 40-43].

(c) "Distribution" lines perform the function of moving the power from substation interconnections with the subtransmission network to the retail customers. Distribution lines generally have voltages of 12.5 KV or less. [Trommerschausen—Tr. V: pp. 41-43].

196. Otter Tail owns and operates 5,992 miles of electric lines. 4,036 miles—about two thirds of the total—consists of 41.6 KV subtransmission line. Otter Tail operates only 737 miles of bulk power supply transmission line consisting of 115 KV and 230 KV line, which is about 12% of the total. The remaining lines consist primarily of low voltage distribution lines with some additional subtransmission line at voltages other than 41.6 KV. [GX 426, p. 22]. Otter Tail developed the

original, basic subtransmission system in its service area. Consequently, no other investor owned utility has constructed any subtransmission lines in Otter Tail's service area. [GX 206].

197. The Bureau of Reclamation basically has only a bulk power supply transmission system in the Otter Tail service area and throughout Region 6.[1]

(a) The Bureau currently has 7,037 miles of electric power lines in Region 6, of which 6,792.2 miles (97 percent) are bulk power supply transmission lines. [GX 286, p. 13].

(b) The Bureau utilizes the already existing subtransmission and bulk power supply transmission lines owned by utilities in Region 6 to move power from its high voltage transmission grid to its preference customers. [Muller Depos. GX 204A; p. 26; GX 204E, p. 38]. The Bureau adopted the policy of utilizing existing transmission facilities owned by others in lieu of constructing its own subtransmission network to deliver power to preference customers for three basic reasons: (1) because it avoids unnecessary duplication of facilities; (2) because it usually is not economically feasible for the Bureau or for a preference customer to build a separate subtransmission line to connect with the Bureau's high voltage transmission system; and, (3) because there is a Congressional mandate, contained in the so-called Keating Amendment which Congress attached to the annual appropriations bill for the Bureau, instructing the Bureau to use existing subtransmission facilities whenever possible. [Muller Depos. GX 204A, pp. 96-100; Muller Depos. GX 204D, pp. 19-20]. The Congressional policy re-

[1] The Bureau power marketing program in the 17 western states is subdivided into 7 regions. The Eastern Division of the Missouri River Basin Project, which encompasses the Otter Tail service area, is within Region 6. [Muller GX 204A, pp. 6, 10].

flected in the Keating Amendment makes it highly unlikely that the Bureau would obtain appropriations from Congress to build subtransmission to serve a preference customer. [Muller Depos. GX 204A, p. 100]. In the majority of cases, the most feasible method for the Bureau to deliver power to preference customers has been the use of existing subtransmission facilities of other power suppliers. [Muller Depos. GX 204A, pp. 99-100].

(c) The Bureau in Region 6 has negotiated and entered approximately 30 contracts with various power suppliers which give the Bureau the right to utilize the existing transmission and subtransmission systems owned by these suppliers to deliver power to its preference customers. [Muller Deps. GX 204A, pp. 96-97].

i. The Bureau has a transmission agreement of this type with Otter Tail. [GX 67]. The Bureau bulk power supply transmission system is interconnected with the Otter Tail subtransmission system at 14 substations. [GX 443]. Pursuant to this contract Otter Tail wheels power from the Bureau system to 17 municipal electric systems and 10 governmental installations. [GX 3-9, GX 11-20]. The Bureau pays a fee to Otter Tail for the use of its subtransmission system. [GX 67, pp. 28-29; Muller Dep. GX 204E, p. 79].

ii. The Bureau-Otter Tail Contract permits Otter Tail to use the Bureau's transmission system to deliver power to loads of Otter Tail. [GX 67, p. 35]. Otter Tail relies substantially upon the high voltage bulk power supply system of the Bureau for power delivery and reliability. [Hartl Tr. VII; pp. 12-13].

(d) The Bureau bulk power supply transmission network does not lessen Otter Tail's dominance in subtransmission in its service area.

i. The contract between Otter Tail and the Bureau contains a provision which Otter Tail interprets to mean that Otter Tail need not wheel Bureau power to any municipality in which Otter Tail sold power at retail as of June 14, 1955. [GX 67, para. 27(c)(2); GX 253]. Otter Tail invoked this provision as the basis for refusing to wheel Bureau power to Hankinson and Elbow Lake. [GX 253; GX 265].

ii. The Bureau has not constructed any subtransmission system in Otter Tail's service area. It has instead relied on its wheeling contract with Otter Tail to use Otter Tail's subtransmission system to deliver power to the Bureau's preference customers in Otter Tail's service area. [GX 206].

iii. The high voltage bulk power supply transmission system of the Bureau which traverses Otter Tail's service area generally cannot be used to serve Otter Tail's retail towns directly. [Trommershausen V: pp. 72-75]. In order to effect a direct delivery of power from the Bureau system to a municipal preference customer it is necessary to (a) install a transformer at the point of interconnection between the Bureau line and the subtransmission line to step the power down to subtransmission voltage; (b) construct a subtransmission line to deliver the power to the town; and (c) install a transformer to step the power down from subtransmission to distribution level voltage. This is too expensive to be economic for either the Bureau or the municipal customer. [Trommershausen Tr. V: pp. 72-75].

198. The portion of the Northern States Power Company Transmission system located adjacent to the Otter Tail service area does not lessen Otter Tail's transmission dominance.

199. The electric power lines owned by rural electric cooperatives in the Otter Tail service area do not significantly lessen the Otter Tail dominance in subtransmission.

(a) It is generally accepted that rural electric cooperatives are of two types: distribution cooperatives whose function is to sell power at retail to rural loads; and, generation and transmission cooperatives which are typically owned by a group of member distribution cooperatives and whose functions are to arrange the production and/or purchase of bulk power for its members and to provide transmission needed to deliver the power to the member distribution cooperatives.

(b) There are 38 distribution cooperatives which operate in portions of the Otter Tail service area. Collectively, the 38 distribution cooperatives own 84,707 miles of transmission lines in the Otter Tail service area. [DX 91]. These are generally low voltage distribution lines. [GX 205 and GX 206.—The map shows electric power lines in the bulk power supply and subtransmission categories.]

i. Whether a coop distribution line can be used to wheel power to a municipal electric system depends upon several factors: The size of the wire in the line; the size of the municipal load to be served; the distance over which the power is to be wheeled; and the distance separating the municipal load from the nearest substation transformer where the distribution line interconnects with higher voltage subtransmission lines. [Nye Tr. IX, p. 97].

ii. There are cooperative distribution lines in the vicinity of Hankinson. These lines are not capable of supplying power to the proposed municipal utility in the town and are not alternatives to the use of Otter Tail facilities for wheeling. [Nye Tr. IX, p. 98].

iii. There are cooperative distribution lines in the vicinity of Elbow Lake. These lines are not capable of supplying power to the municipal utility in the town and are not alternatives to the use of Otter Tail facilities for wheeling. [Nye Tr. IX: p. 98].

iv. A cooperative is able to wheel Bureau power over its distribution lines to the municipal utilities in Aurora and Colman due to proximity of the towns to substations connecting the coop distribution lines with subtransmission lines and due to the proximity of the coop distribution lines to the town.

v. In most portions of its service area the presence of low voltage distribution lines does not lessen the dependence of a proposed municipal system upon the Otter Tail subtransmission system for delivery of power. The two areas depicted by DX 92 and DX 93 encompass small areas as compared with the entire Otter Tail service area. [GX 206B; GX 205].

(c) There are 7 generation and transmission rural electric cooperatives (G&T coops) which operate in portions of the Otter Tail service area. The 7 G&T coops collectively own approximately 3000 miles of electric power lines. Minnkota Power Cooperative, Inc. owns 2017 miles of the total, and the other 6 G&T coops own a total of 883 miles. [DX 91]. The presence of the electric power lines owned by the 7 G&T coops in the Otter Tail service area does not significantly lessen Otter Tail's dominance in subtransmission.

i. Otter Tail has entered into transmission agreements with six of the G&T cooperatives which provide for various mutual services, including interconnections between the parties and the use by each party of the transmission facilities of the other to deliver power to customers beyond the reach of its own existing transmission lines. [GX 22, 40, 41-47, 48-55, 65].

a. The Otter Tail transmission agreements with Cooperative Power Association, Lyon-Lincoln Electric Cooperative, Inc. and Traverse Electric Cooperative, Inc., RSR Electric Cooperative, Inc., and East River Electric Cooperative, Inc., contain provisions which prohibit the use of Otter Tail's transmission system by the cooperatives to supply power to a retail customer served by Otter Tail and extend the same prohibition with respect to customers served by the cooperative. [GX 22, 38, 39, 65; Hartl VII: 32-35]. Otter Tail's agreement with RSR Electric Cooperative, Inc., which contains a provision barring each party from using the facilities of the other to take away retail customers served by the other party, was entered into on January 18, 1968 subsequent to the municipal agitation in Hankinson, North Dakota where RSR attempted to deliver power to the proposed municipal electric system. [GX 38; Hartl Tr. VII; p. 121]. Otter Tail's transmission agreement with East River Electric Cooperative, Inc. was entered into on June 13, 1969 subsequent to the establishment of municipal electric systems in Colman and Aurora, South Dakota for whom East River and one of its member cooperatives wheel power from the Bureau of Reclamation. [GX 65]. The provision in the

agreement which bars each party from using the other's facilities to serve retail customers of the other is contained in a standard form contract Otter Tail recently developed for such contracts. [GX 65, Hartl Tr. VII: pp. 122-23].

b. Otter Tail's transmission agreements with United Power Association, Central Power Electric Cooperative, Minnkota Power Cooperative and Runestone Electric Association do not contain any provision explicitly restricting service to existing customers of the other. [GX 40, 41-47, 48-55, 57; Hartl Tr. VIII: pp. 28-31]. It is not necessary for Otter Tail to have provisions restricting service to its existing customers in all transmission agreements with rural electric cooperatives. For example, Otter Tail does not need such a provision in its agreement with United Power Association, because Otter Tail agreed to deliver power for UPA to certain specified points only, none of which are near any town served at retail by Otter Tail. [Hartl Tr. VIII: pp. 78-79]. Delivery to any additional points requires the assent of Otter Tail. The approval of Otter Tail is necessary in the other contracts to enable the cooperative to use the integrated transmission facilities to serve municipal customers.

(c) The existence of the integrated transmission agreements between Otter Tail and rural electric cooperatives obviated the need for the cooperatives to build additional transmission.

200. It is not feasible to avoid dependence upon the Otter Tail subtransmission system by building a new line to connect a municipal utility with a wholesale power supplier.

(a) The construction and operation of an isolated and independent plant to generate electricity is not an economic or efficient method for obtaining power to supply a municipal electric system in the towns in the Otter Tail service area, most of which are relative small. [Trommershausen V: 57-58, 64; Morton Tr. X; p. 70; Nye Depos. GX 288, p. 75].

(b) The construction of independent radial lines to connect with the facilities of other power suppliers is not an economical or reliable method of obtaining delivery of power for the vast majority of towns served at retail by Otter Tail. Radial lines provide less reliable service than so-called "loop service." Radial lines are connected with a power supply at only one end, whereas most towns served at retail by Otter Tail receive "loop service" from transmission lines which are connected with power supply at both ends. If the one power supply for a radial line fails there is a complete blackout, whereas loop service provides an alternative supply if such a failure occurs. [Trommershausen Tr. V: 70-71; Tr. VI: 85-86; Nye Tr. IX: 80-81].[2]

(c) The majority of towns served at retail by Otter Tail could not afford to build a radial line to connect with another power supplier.

i. The total cost for a mile of 41.6 KV transmission line today would exceed $10,000 to which the costs of substations and other connection facilities must be added. [Trommershausen Tr. V: p. 61].

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[2] Otter Tail sold its distribution system in the town of Georgetown, Minnesota to a rural electric cooperative because the town was located at the end of a long radial line which caused difficulty to Otter Tail in providing adequately reliable service to the town. [GX 84: Stipulation 97-106].

ii. It would cost approximately $560,000 at current costs to build a 39 mile radial 41.6 transmission line from Hankinson, North Dakota to the nearest Bureau substation at Forman, North Dakota, including appropriate connection facilities. [Trommershausen Tr. V: pp. 60-62]. The Bureau found that it would not be economically feasible for it to construct such a line to serve Hankinson. [GX 256]. It would cost approximately $446,000 at current cost to build a 29 mile radial 41.6 KV transmission line from Elbow Lake, Minnesota to the nearest Bureau substation at Morris, Minnesota, including appropriate connection facilities. [Trommershausen Tr. V: p. 70]. It is economically infeasible for towns the size of Hankinson and Elbow Lake to construct such lines. [Trommershausen Tr. V: pp. 60-62, 70].

(d) The construction of radial lines to serve single towns is also undesirable because such lines often needlessly duplicate existing transmission lines which have capacity to serve the towns and have a detrimental impact upon the environment. Construction of radial lines to serve Elbow Lake and Hankinson would have wastefully duplicated existing Otter Tail transmission lines. [Trommershausen Tr. V: pp. 60, 70; Tr. VI: p. 86; GX 206].

201. Otter Tail used its dominance in subtransmission to prevent municipal electric systems in Elbow Lake and Hankinson from obtaining power from wholesale suppliers.

VI. THE USE OF LITIGATION TO PRESERVE AND MAINTAIN A MONOPOLY

202. The sale of electric revenue bonds by municipalities to finance the establishment of municipal electric systems is impossible if there is any litigation pending or impending which concerns the municipal power project.

(a) The bonds customarily used to finance the establishment of municipal electric systems in North and South Dakota and Minnesota are electric revenue bonds. Holders of electric revenue bonds are repaid only from revenues produced by the operation of the municipal electric system. [Holton Tr. III: p. 3; GX 357].

(b) A municipality which desires to sell electric revenue bonds customarily retains an attorney knowledgeable in the sale of bonds whose function is to satisfy himself that the proposed municipal electric system is a feasible venture and that the bonds are marketable. [Holton Tr. III: pp. 4, 5]. In performing this function the bond counsel must determine: that there exists statutory authority for the issuance of the bonds [Holton Tr. III: p. 4]; that the proposed municipal electric system will yield sufficient revenue to repay the bondholders. [Holton Tr. III: pp. 4-5 and GX 357]; that an adequate supply of electric power will be available to permit the operation of the municipal electric system [Holton Vol. III: pp. 5-6 and GX 358]; that there exists an assured means of delivering the power to the municipal electric system [Holton Tr. III: pp. 5-6; GX 349, GX 357, GX 358]; and, that no litigation is pending or is threatened concerning any aspect of the proposed municipal electric

system. [Holton Tr. III: pp. 6-7; GX 325, GX 357, GX 367 and GX 369]. The bond counsel concludes his work by preparing an opinion reflecting his evaluation as to the viability of the municipal electric system and the marketability of the bonds. The town must execute a "certificate of no-litigation" which states that there is no pending or impending litigation concerning any aspect of the proposed municipal electric system. [Holton Tr. III: p. 6; GX 365]. The town must deliver the certificate of no-litigation to the bond counsel in order to enable the bond counsel to submit his opinion to the bond buyers on the date on which the bonds are to be sold. It is the universal custom in the bond business to require the delivery of the opinion of the bond counsel before the sale of the bonds. [GX 367]. There can be no sale of the bonds unless the bond counsel submits his opinion approving the sale, and the bond counsel cannot submit the opinion unless and until he receives a certificate of no-litigation from the town. [GX 369].

203. The litigation which Otter Tail directly or indirectly initiated in Aurora, Elbow Lake, Colman and Hankinson prevented each town from delivering the requisite certificate of no-litigation to bond counsel which in turn prevented the towns from proceeding with the sale of the bonds until the litigation was resolved. No progress toward the establishment of the municipal electric systems in the four towns was possible until the litigation ended and the bonds could be sold.

VII. DISCRIMINATORY NATURE OF THE OTTER TAIL REFUSAL TO DEAL POLICY

A. *Refusals to Wheel*

204. Wheeling is a practical and economic method by which to transmit electric power.

(a) Wheeling is an operation in which one utility uses the transmission facilities of another utility to move electric power from one location to another. [Trommershausen Tr. V: p. 46].

(b) There are two ways in which wheeling can be accomplished. The first method involves one utility placing a block of power into the transmission system of a second utility with that block of power physically transmitted to a point of redelivery into the system of the first utility or to a customer of the first utility. The second method is by displacement, which involves the delivery of a block of power by one utility into the transmission system of a second utility. The second utility uses the block of power to serve the load on part of its system and delivers an equivalent amount of power back at another point of the system of the first utility or to a customer of the first utility. [Trommershausen Tr. V: pp. 46-49].

(c) Wheeling is practical from both an engineering and an economic standpoint.

i. The practice among electric utilities is to construct transmission so that the utility will have excess capacity needed to meet anticipated future load growth. It is currently deemed advisable for a utility to plan its transmission system so that the system will have sufficient excess capacity to meet the load growth projected for the utility

10 years hence. The transmission system of a utility therefore always has a margin of unused excess capacity. Accordingly, utilities frequently decide to utilize this excess capacity by wheeling power for others, thereby earning a rate of return on what would otherwise be idle capacity and making full use of existing facilities. [Trommershausen Tr. V: pp. 50-52].

ii. Wheeling eliminates the need to build duplicate transmission lines, thereby reducing total construction expenses for utilities as well as lessening the impact of electric systems upon the environment. [Trommershausen Tr. V: pp. 49-51].

iii. Wheeling also serves to provide more reliable service by utilizing completed transmission loops, which prevents outages of entire areas, whereas the construction of duplicate radial transmission lines would subject the customers to the risk of complete outages. [Trommershausen Tr. V: pp. 49-51].

205. Otter Tail wheels power for investor owned utilities, rural electric cooperatives, state and government institutions and municipal electric systems to customers which Otter Tail does not serve at retail.

(a) Otter Tail wheels power produced by the Bureau of Reclamation from the Bureau transmission grid to various preference customers of the Bureau pursuant to its transmission agreement with the Bureau. [GX 67; GX 3-9; GX 11-20].

i. Otter Tail presently wheels Bureau power to 17 municipally owned electric systems in its service area. Ten of these customers purchase their total power supply

at wholesale from the Bureau. The remaining seven have some generation of their own and purchase only part of their power supply at wholesale from the Bureau. [GX 3-9; GX 11-20] Otter Tail has negotiated a contract with each of these municipal wheeling customers which sets forth the terms and conditions for Otter Tail's wheeling service. [GX 3-9; GX 11-20] Otter Tail also wheels power from the Bureau to 10 governmental institutions in its service area. [Nye Tr. IX: pp. 90-91; DX 94, Sch. D]

ii. Otter Tail receives compensation for wheeling power from the Bureau of Reclamation to the 17 municipal electric systems. [GX 3-20; Trommershausen Tr. V: p. 83; Tr. VI, p. 43; Muller Dep., GX 204E: p. 79]

iii. The Bureau-Otter Tail wheeling contract and the special municipal service agreements which Otter Tail has entered into with each of its 17 municipal wheeling customers provide that Otter Tail will wheel power only to the extent that Otter Tail has excess capacity in its transmission lines. [GX 3-20, GX 67] The Bureau annually furnishes Otter Tail with projected four year load forecasts for the preference customers to which Otter Tail wheels Bureau power. Otter Tail then notifies the Bureau whether it has surplus capacity in its transmission lines to wheel all the power during the four year period. [Trommershausen Tr. V: pp. 51-52] The four year surplus capacity notice system has been used for the past 20 years and has worked well. There have been no instances in the Bureau Region 6 where excess capacity has not been found to wheel power to the Bureau's preference customers. [Trommershausen Tr. V: pp. 51-52; Tr. VI: pp. 94-95]

(b) In the late 1960's Otter Tail agreed to wheel power from the Bureau to the State School for the Deaf in Devils Lake, North Dakota. [Hartl Tr. VIII: pp. 24-28] The School was formerly served at retail by Otter Tail. [Hartl Tr. VIII: p. 56] The load represented by the School is greater than the loads of many of the towns presently served at retail by Otter Tail. [Hartl Tr. VIII: pp. 27-28] Otter Tail wheels Bureau power to nine other governmental installations which are former or were prospective retail customers of Otter Tail. [Nye Tr. IX: p. 91; DX 94, Sch. D]

(c) Pursuant to transmission agreements with rural electric cooperatives Otter Tail wheels power to various customers and facilities of these cooperatives. [GX 22; GX 38-59; GX 65] Otter Tail recently agreed to wheel power supplied by Basin Electric Power Cooperative to Lyon-Lincoln and Traverse Electric Cooperatives. [GX 39; Hartl Tr. VIII: pp. 23-24]

(d) On an engineering basis, there is no reason why Otter Tail could not wheel power from another supplier to a town which it presently serves at retail. The amount of power required by the town is the same whether it is sold to the town on a retail basis by Otter Tail or is wheeled to the town by Otter Tail from another supplier. [Trommershausen Tr. VI: p. 83] The same transmission facilities would be used to wheel the power as are used by Otter Tail to deliver the power at retail, so there is no doubt that Otter Tail would have capacity in its lines to wheel power to the town. [Trommershausen Tr. V: pp. 83-84]

B. *Refusals to Sell Power at Wholesale*

206. A wholesale sale is the sale of power for resale by the purchaser to someone else. [Trommershausen Tr. V: p. 76]

Many investor owned utilities sell power at wholesale to municipal electric systems. [GX 425] Such sales are commonly either total requirements sales, where the municipal electric system purchases its total power needs from the seller, or partial requirements sales, where the municipal electric system itself produces part of the power it needs and purchases the balance from a wholesale supplier. [GX 425; Trommershausen Tr. V: pp. 76, 77] [3]

207. Otter Tail sells power at wholesale to investor owned utilities and has offered to sell power at wholesale to municipal electric systems to which it wheels power.

(a) Otter Tail sells power for resale to fellow members of the Upper Mississippi Valley Power Pool. In 1970 Otter Tail sold 215,308,000 kilowatt hours of electric energy to members of the pool for resale to their customers and Otter Tail derived a revenue of $1,550,200 from such sales. These sales are classified by the Federal Power Commission as "Sales for Resale" and are wholesale sales. [GX 441, pp. 409, 413; Trommershausen Tr. V: p. 84] Otter Tail has sold power at wholesale to members of the Upper Mississippi Valley Power Pool for resale to utilities which are not members of the pool. [GX 56]

(b) Otter Tail will sell power at wholesale to municipal electric systems to which it also wheels power from the Bureau of Reclamation. In each special municipal contract which Otter Tail has entered into with the 17 municipal electric systems to which it wheels power from the Bureau

[3] Colman and Aurora each purchase their full requirements from the Bureau at wholesale. Elbow Lake seeks to become a partial requirements customer. See Part III, Sections A, C and D of the proposed findings for the details.

there is a provision for "Firm Electric Service."[4] This provision provides that the municipality must purchase from Otter Tail all power required by the municipality in addition to the power supplied by the Bureau. [GX 3-20]

(c) Otter Tail has an agreement with the City of Willmar, Minnesota which provides for an emergency interconnection between Otter Tail's system and the municipal electric system of Willmar. [GX 21] Under this agreement Otter Tail will supply power at wholesale to Willmar during emergencies. [GX 21; Hartl Tr. VII: p. 24] Willmar operates a municipal electric system and receives power from the Bureau which is wheeled to the town by Rural Cooperative Power Association. [Hartl Tr. VII: p. 24] Otter Tail is willing to supply emergency power at wholesale to Willmar because it was not a former retail customer of Otter Tail. [Hartl Tr. VII; pp. 116-118] Otter Tail refused to make the same type of emergency interconnection with the municipal system established in Elbow Lake, Minnesota because Elbow Lake was formerly a retail customer of Otter Tail. [Hartl Tr. VII: pp. 116-118]

(d) Otter Tail has entered into contracts with six rural electric cooperatives pursuant to which Otter Tail agrees to provide standby and emergency power at wholesale to the cooperatives. [GX 77-82]

(e) From an engineering standpoint, there is no reason why Otter Tail could not sell power at wholesale to a town which it presently serves at retail. The amount of power required by the town is the same whether it is sold to the town on a retail or wholesale basis. [Trommershausen Tr.

[4] Firm electric service, as used in these provisions, is power sold by Otter Tail at wholesale to the municipal system for resale. [Trommershausen Tr. V: 78-82]

VI: p. 83] The changeover would merely involve a bookkeeping change by Otter Tail. The same generation and transmission facilities would be used to generate and deliver the identical amount of power at wholesale to the municipal electric system as are used to deliver power at retail to the town. [Trommershausen Tr. VI: pp. 83-84]

(f) No other investor owned electric utility in Minnesota, or North Dakota and South Dakota has a policy similar to Otter Tail's regarding wholesale sales. [Hartl Dep., GX 287, p. 176]

(g) Otter Tail is the only investor owned electric utility in the United States which has filed a statement with the Federal Power Commisison to the effect that it does not hold itself out generally to sell power at wholesale. [Hartl Dep., GX 287; p. 174-176; Hartl. Tr. VIII: pp. 93, 94]

208. Otter Tail previously sold power to municipal electric systems and rural electric cooperatives at wholesale.

(a) Otter Tail filed its policy statement regarding wholesale sales with the FPC in 1947. [Hartl Tr. VIII: p. 93; GX 83] In 1949 Otter Tail supplied power at wholesale to 22 rural electric cooperatives, 16 municipalities and one other wholesale customer on either a full or partial requirements basis. [DX 89]

(b) In 1949 Otter Tail applied to Federal Power Commission for approval to raise its wholesale rates by 30 percent. [DX 89; Hartl Tr. VIII: p. 3] The rural electric cooperatives resisted the wholesale rate increase by Otter Tail. [Hartl Tr. VIII: p. 3] The Federal Power Commission conducted a hearing concerning the proposed increased wholesale rates because the rates were higher for rural electric cooperatives than for other wholesale customers and because

many cooperatives protested the higher rate. [DX 89] The Commission eventually approved the increased wholesale rates. [Hartl Tr. IX: p. 6]

(c) During the early 1950's Otter Tail was having difficulty in supplying power to meet the growing loads of the rural electric cooperatives it served at wholesale, and Otter Tail informed them that it could not meet their total power needs. [Hartl Tr. VIII: pp. 3-4; GX 444, pp. 2130-2131] During that period Northern States Power Company's (NSP) wholesale rate for service to rural electric cooperatives was lower than the Otter Tail rate and NSP had excess power. [Hartl Tr. VIII: p. 4] Otter Tail transferred some of its wholesale rural electric cooperative customers to Northern States Power Company in the early 1950's. [Hartl Tr. VIII: pp. 4-5; Hartl Tr. IX: p. 7]

(d) The 22 rural electric cooperatives formerly served at wholesale by Otter Tail ultimately became customers of the Bureau of Reclamation or members of Generation and Transmission Cooperatives. [Hartl Tr. VIII: p. 5; IX: p. 7] Thirteen of Otter Tail's 16 wholesale municipal customers ultimately became wholesale customers of the Bureau of Reclamation; two of them became retail customers of Otter Tail and one became a customer of a rural electric cooperative. [Hartl Tr. IX: pp. 8-9]

VIII. LACK OF JUSTIFICATION FOR THE REFUSAL TO DEAL POLICY

A. *No Threat of Substantial Erosion of the Otter Tail System*

209. The Bureau of Reclamation is and will continue to be unable to sell much, if any, power at wholesale to new munici-

pal electric systems in towns presently served at retail by Otter Tail.

(a) The Bureau of Reclamation is an agency of the U.S. Department of Interior, the primary functions of which are the reclamation of land, flood control, and irrigation supply achieved through the construction of dams, reservoirs and water conveyance systems. [Muller Dep. GX 204A: p. 5] The major ancillary functions of the Bureau are the development of hydroelectric power at dams constructed primarily for reclamation, navigation and irrigation purposes; the supply of water to municipalities and industry; and the development of water recreational facilities. [Muller Dep. GX 204A: p. 5]

(b) The Missouri River Basin Project administered by the Bureau of Reclamation is the source of Bureau power for preference customers in the Otter Tail service area. Congress authorized the Project for the purpose of constructing dams on the Missouri River and its tributaries in order to prevent floods, irrigate land and improve navigation on the Missouri River. [Muller Dep. GX 204A: p. 8]

i. The first dam in the Missouri River Basin Project was authorized in 1938 and the rest of the project was authorized principally by the Flood Control Act of 1944. [Muller Dep. GX 204A: pp. 8, 9] The U.S. Army Corps of Engineers constructed the dams in the Project and the Bureau markets the hydroelectric power produced at these dams. [Muller Dep. GX 204A: pp. 7, 8]

ii. The Missouri River Basin Project is divided into two divisions, the Eastern Division and the Western Division, for purposes of marketing the hydroelectric power produced by the project. [Muller Dep. GX 204A: p. 10]

The Eastern Division encompasses the States of North Dakota, South Dakota, eastern Nebraska, western Iowa and Minnesota, and Montana east of the Continental Divide. [GX 205; Muller Dep. GX 204A: pp. 6, 7, 10-13] Region 6 of the Bureau handles power marketing in the Eastern Division [Muller Dep. GX 204A: pp. 6 and 10] Virtually all of Otter Tail's service area is located within the boundaries of the Eastern Division of the Missouri River Basin Project [GX 205]

iii. In Region 6 the Bureau markets power produced at six hydroelectric plants built by the Corps of Engineers which have a total installed capacity of 2,048,000 kilowatts. [GX 286, p. 10] In Region 6 the Bureau also markets power produced at two hydroelectric plants built and operated by the Bureau itself, which plants have a total installed capacity of 300,000 kilowatts. [GX 286, p. 8]

(c) The Bureau markets power in accordance with various prescribed standards.

i. The Bureau sells power only at wholesale, with the minor exceptions of some sales to ultimate customers, i.e. sales to Federal and State institutions. [Muller Dep. GX 204A: p. 23] The Bureau sells power pursuant to contracts, under published rate schedules which cover the operation and maintenance expenses of the project facilities and recoup the cost of the facilities with interest over a 40 year period. [Muller Dep. GX 204A: p. 24] The Bureau is directed by statute to give preference in the sale of power to public bodies and agencies, including municipal electric systems, rural electric cooperatives and other nonprofit organizations. [Muller Dep. GX 204A: pp. 24,

25] Because the Bureau does not have enough power to meet the needs of all potential preference customers, the Bureau periodically allocates its power resources among the customers which apply to it for power supply. [Muller Dep. GX 204A, pp. 38-39] The Bureau markets all long term commitments of power within specified marketing areas, although some short term sales of power are sometimes made to utilities outside such areas. [Muller Dep. GX 204A: p. 25]

ii. The Bureau sells power at wholesale to all types of utilities which sell power at retail, including investor-owned utilities such as Otter Tail, rural electric cooperatives, State power districts and municipal electric systems. [Muller Dep. GX 204A: p. 27] The Bureau sells various types of power at wholesale, variously described as long term firm, additional firm, short term firm, seasonal firm, firm peaking, supplemental, replacement, irrigation, emergency, maintenance, dump and interchange. [GX 311; p. 27; Muller Dep. GX 204A: pp. 27-31] Firm power means power which is furnished on a continuous basis for the term of the contract. [Muller Dep. GX 204A: p. 28] Long term power generally refers to power contracted to be delivered for 10 years or longer. [Muller Dep. GX 204A, p. 28]

(d) The Bureau in Region 6 allocated long term firm power to preference customers in 1954, 1959 and 1964. [Muller Dep. GX 204A: p. 31; Muller Dep. GX 204B: p. 37] These three allocations of long term firm power were made on the basis of the firm power available from the power plants existing at the time on the Missouri River. [Muller Dep. GX 204B: p. 38] There has been no allocation of power

by the Bureau since the 1964 allocation. [Muller Dep. GX 204A: p. 35; GX 204A: pp. 47, 48]

(e) The requests for power received by the Bureau in 1964 exceeded the anticipated supply of power, which necessitated the use of the allotment procedure. [Muller Dep. GX 204A: pp. 38, 39]

i. The Bureau on July 8, 1964 allocated power to 238 preference customers. [GX 214; Muller Dep. GX 204A: p. 46] One hundred and eighty-five of the allottees subsequently entered into contracts with the Bureau for the supply of power. [Muller Dep. GX 204A: p. 46] The Bureau rescinded the allotments of 40 allottees, primarily because they decided not to use Bureau power or because there were difficulties in delivering the power to them. [Muller Dep. GX 204A: p. 47] Seven of the allotments were transferred to or consolidated with an allotment to another preference customer. [Muller Dep. GX 204B: pp. 39, 40] Six of the allotments are still outstanding, including one to Elbow Lake, Minnesota. [Muller Dep. GX 204B: p. 40] These remaining six allotments are very small and combined do not exceed 2,000 kilowatts. [Muller Dep. GX 204B: pp. 40, 41]

ii. Only eight towns served by Otter Tail at retail applied for allotments of power from the Bureau in 1964. [GX 214; Muller Dep. GX 204D: pp. 40-45] Colman and Aurora, South Dakota established municipal electric systems and are using their allotments. Elbow Lake, Minnesota, was not able to obtain delivery of Bureau power to the municipal system it established and its allotment is still outstanding. The allotments to the remaining five towns, including Hankinson and Finley, North Dakota,

were withdrawn after the towns notified the Bureau that they no longer wanted the allocations. [Muller Dep. GX 204D, pp. 44-45]

iii. The total amount of power allocated in 1964 by the Bureau was 1,845,000 kilowatts, consisting of 1,229,000 kilowatts of Class I firm power available immediately and 616,000 kilowatts of Class II power to become available in the future. [GX 214; Muller Dep. GX 204A: p. 53] Class I power was designated as long term power. [Muller Dep. GX 204A: p. 53] Class II power was eventually designated as additional firm power. [Muller Dep. GX 204A: pp. 53, 54]

iv. Class II power is the supply of additional firm power which has been used by the Bureau to meet the load growth requirements of the preference customers which received an allocation of Class I power in 1964. [Muller Dep. GX 204A: p. 55] The Bureau has announced three extensions of the time limit for the availability of additional firm power to meet the load growth requirements of its existing preference customers. [Muller Dep. GX 204A: p. 55] These extensions mean that the Bureau guarantees to meet additional load growth of existing preference customers up to a specific date. As more capacity develops, the date is moved ahead. The first extension was to 1970, the second to 1973, and the current extension is to meet the existing commitments of existing preference customers to 1977. [GX 216, GX 217; Muller Dep. GX 204A: pp. 55, 57] The three extensions of power supply availability made by the Bureau since 1964 have applied only to existing preference customers who already have been allotted power by the Bureau. [Muller Dep. GX 204A, pp. 56-57]

(f) It is very unlikely that the Bureau will make another allocation of power in Region 6. There are no projected surpluses of power after 1977 and the Bureau has no new generating capacity scheduled to go into operation. [Muller Dep. GX 204A, p. 61] The Bureau's total capacity from its hydroelectric plants is committed to its existing preference customers, and the Bureau does not foresee any other bulk power supply resources in the near future. [Muller Dep. GX 104C, pp. 64-65]

(g) The Bureau presently does not have power available to supply any new municipal electric systems located in the Eastern Division of the Missouri River Basin Project.

i. The Bureau in Region 6, since the beginning of 1970, has formally notified at least six towns in writing that it has no long term firm power available for a new municipal electric system. [GX 218-230; 232-234; Muller Dep. GX 204C, p. 67; Muller Dep. GX 204C, pp. 69-70] The Bureau may have some short term firm power available, but this is not a satisfactory power supply for a new municipal electric system. [GX 219, 225, 228; Muller Dep. GX 204A, pp. 64 to 68; Muller Dep. GX 204C, pp. 28-32; 69-70] The Bureau has informed existing preference customers that its resources will be fully utilized after 1977 and they should seek alternative power suppliers after that date. [GX 231; Muller Dep. GX 204A, pp. 80-81; Muller Dep. GX 204E, pp. 69-70] The Bureau does not and has not saved any power resources for possible new preference customers. [Muller Dep. GX 204A, p. 74]

(h) It is very unlikely that the Bureau will have very much, if any, power available for new municipal electric systems in the near future. [Muller Dep. GX 204A, pp. 84

to 86] It is not likely that Region 6 of the Bureau will obtain power from other regions of the Bureau. If any power were available it would be only on a temporary, short term basis. [Muller Dep. GX 204A, p. 85] The policy of the Bureau is against the purchase of power from other power suppliers for the purpose of increasing the Bureau's firm power supply. [Muller Dep. GX 204A, pp. 85, 86]

i. The Bureau's power resources available for marketing are presently fixed and there is no foreseeable accretion of resources. [Muller Dep. GX 204C, p. 20]

ii. The arrangements which the Bureau has with Basin Electric Power Cooperative to purchase surplus energy from Basin do not provide any additional power resources for the Bureau to meet the load growth of its existing preference customers beyond 1977. [Muller Dep. GX 204A: pp. 91-92; Muller Dep. GX 204B: pp. 53-55] The Bureau will not obtain any additional long term firm power to sell to preference customers when Basin's second generating unit goes into operation in 1975. [Muller Dep. GX 204B: pp. 49-52] The Bureau has contracts to sell fixed amounts of power to rural electric cooperatives which are members of Basin and these contracts will continue in effect after Basin's second unit comes on line. [Muller Dep. GX 204B: pp. 49-51]

iii. The Bureau will not obtain any additional long term firm power to sell to preference customers when the 800 megawatt unit, jointly owned by Nebraska Public Power District and Iowa Power & Light Company, goes on line. [Muller Dep. GX 204E; pp. 61-63]

210. The Basin Electric Power Cooperative is not a substantial source of wholesale power for new municipal electric systems in the Otter Tail service area.

(a) Basin Electric Power Cooperative is a generation and transmission cooperative headquartered in Bismarck, North Dakota, which was incorporated in 1961 by a group of rural electric cooperatives to supply themselves with power in addition to the power they obtained from the Bureau of Reclamation. [Grahl Tr. IV: pp. 2-3] Basin supplies power to cooperatives located in eight states: Montana, North Dakota, South Dakota, Nebraska, Iowa, Minnesota, Wyoming and Colorado. [Grahl Tr. IV: p. 4]

(b) Basin presently operates one generating unit with a nameplate capacity of approximately 216,000 kilowatts, which began commercial operation in January 1966, and Basin plans to construct a second generating unit with a nameplate capacity of 460,000 kilowatts to go into commercial operation in the fall of 1975. [Grahl Tr. IV: pp. 4-5]

(c) Basin has three types of members. Class A members are generation and transmission cooperatives which have executed contracts or intend to execute such contracts for the purchase of long term firm power from Basin over a 35 year period. Class B membership is available to any entity, including a municipal electric system, which wishes to buy short term power from Basin. Class C members are distribution rural cooperatives which are members of the Class A Generation & Transmission Cooperatives. [Grahl Tr. IV: pp. 7-8]

(d) All long term firm power from Basin's first and second generating units have been allocated by contract to Class A members. [Grahl Tr. IV: p. 8] During the winter

of 1970-1971 Basin sold 165,000 kilowatts out of the 170,000 kilowatt delivery capacity of its generating unit to Class A members. [Grahl Tr. IV: pp. 19-20]

(e) Basin can sell only surplus short term firm power to Class B members such as municipal electric systems. [Grahl Tr. IV: pp. 8-9] Basin has never sold any power and presently does not sell power to a Class B municipal electric system. [Grahl Tr. IV: p. 9] Basin does not promote the establishment of municipal electric systems. [Grahl Tr. IV: p. 9] If a town which wants to establish a municipal electric system asks Basin to supply the municipal system with wholesale power, it is Basin's policy to tell the town first to attempt to buy power from the town's present supplier. If that is not possible, then Basin directs the town to request power from the Bureau. If neither the present supplier nor the Bureau can or will sell power at wholesale to the town, then Basin offers to supply short term power to the town if Basin has any surplus available. [Grahl IV: 9-10; GX 306]

(f) The contractual relationships between Basin and the Bureau increases the power marketing capacity of each only to a very limited extent. Basin and the Bureau entered into a contract in 1962, and have agreed to subsequent supplements thereto, concerning the use of a joint transmission system and other mutual services. [GX 235]

i. Basin Electric has very little transmission line. It owns about 12 miles of 230 kv line which interconnects Basin's generating unit to the Bureau transmission grid and about 12 miles of 115 kv line which supplies start up power to its generating unit. [Grahl Tr. IV: p. 5] The Basin-Bureau contract provides the means by which Basin delivers power to its customers over the Bureau trans-

mission grid, for which service Basin pays the Bureau approximately $1 million a year. [Grahl Tr. IV: pp. 5-6]

ii. Pursuant to the Basin-Bureau contract, the Bureau furnishes backup power to Basin when its generating unit is shut down for maintenance or during an emergency. In exchange, Basin gives the Bureau first refusal rights on low cost winter electric energy available from Basin's generating unit. [Grahl Tr. IV: p. 11; Muller Dep. GX 204A: pp. 89, 90]

iii. Basin and the Bureau also have short term agreements, terminable on one year's notice, which provide that Basin will sell its surplus power and energy to the Bureau which in turn markets the power. [Grahl Tr. IV: pp. 11-12, 20-23; Muller Dep. GX 204A: pp. 89, 90] The Bureau sells most of the surplus power it obtains from Basin to investor owned utilities, including Otter Tail, and to a lesser extent to rural electric cooperatives. [Grahl Tr. IV: p. 2] The Bureau has not sold any of its Basin surplus power to municipal electric systems. [Grahl Tr. IV: pp. 21-22] The power which Basin sells to the Bureau pursuant to this arrangement is short term surplus power and does not increase the amount of long term firm power the Bureau can market to preference customers. [Muller Dep. GX 204E: pp. 18-19] The amount of surplus energy that Basin has available for sale to the Bureau declines as the loads of its members increase. [Muller Dep. GX 204E: pp. 18-19, 24]

iv. The Bureau-Basin contract also provides that the Bureau will provide peaking power to Basin over three time periods so that Basin can supply the loads of its members to the extent that they exceed Basin's own gen-

eration capacity. [Muller Dep. GX 204E: pp. 15-17; Muller Dep. GX 204C: pp. 11-12]

211. The Missouri Basin Systems Group does not create an additional source of wholesale power for municipal electric systems. The Missouri Basin Systems Group (MBSG) was formed on January 31, 1963. [GX 235; Muller Dep. GX 204C: pp. 5, 6] Its membership consists of the Bureau of Reclamation, Basin Electric Power Cooperative, and various municipal electric systems, rural electric cooperatives and public power districts in eight states, most of which are preference customers of the Bureau. [GX 235; Grahl Tr. IV: pp. 23-24; Muller Dep. GX 204A: pp. 92-93; GX 204C: pp. 2-4] MBSG principally serves as a vehicle for joint planning of facilities among the members. It is dissimilar to power pools such as the Upper Mississippi Valley Power Pool in which the members frequently exchange power or share reserves. [Muller Dep. GX 204A: pp. 92-93; GX 204C: 4-7; Grahl Tr. IV: pp. 24-26, 63] Decisions of MBSG are not binding on its members, who can withdraw on one year's notice, and actual pooling of resources must be done pursuant to separate contracts between the members. [Muller Dep. GX 204C: pp. 4-7; Grahl Tr. IV: pp. 24-26, 63] Basin's second generating unit and an 800,000 kilowatt unit to be constructed in Nebraska, which will be jointly owned by Nebraska Public Power District and Iowa Power and Light Company, an investor owned utility, are the only two units which have resulted from joint planning by members of the Missouri Basin Systems Group. [Grahl Tr. IV: pp. 26-27, 63-64] The construction of some 345 kv transmission line has also been jointly planned. [Grahl Tr. IV: p. 27]

212. Neither the North Central Power Study nor the Corp of Engineers study of additional peaking capacity on the Mis-

souri River is likely to yield much additional power for new municipal electric systems in Otter Tail Power's service area.

(a) The North Central Power Study was initiated by the Department of Interior in May 1970. The participants are approximately 36 public and private utilities, including the Bureau and Otter Tail, located in 13 states. The purpose of the study is to analyze the power supply resuroces and needs of the various utilities in the 13 state area between the years 1980 and 2000. [Grahl Tr. IV: p. 12, 13]

i. The study is currently in the preliminary planning stage. An important aspect of the study is the construction of large mine mouth generating plants in the coal fields in Montana, Wyoming and North Dakota. [Grahl Tr. IV: p. 12] The study is proceeding on the assumption that the participants will obtain up to one-third of their additional power requirements between 1980 and 2000 through joint efforts spawned by the study. This would amount to approximately 20,000 megawatts. [Grahl Tr. IV: p. 38] The role of the Bureau as envisaged by the North Central Power Study is to construct a limited amount of hydro-peaking plants and build waterways and aquaducts to deliver water to the mine mouth thermal units to be built on the western coal fields. [DX 24] The Bureau in Region 6 has no thermal generation units. [Muller Dep. GX 204E: p. 66] The study is proceeding on the assumption that the power resources available to the Bureau from the study will be fixed at a level necessary to meet the Bureau's 1977 load, so that the study cannot be used to expand the Bureau's marketable power supply beyond this level. [Hartl Tr. VIII: pp. 59-62]

ii. In the next phase of the study the various participants will study the preliminary plans and projections and

decide whether to build their own plants or join with others in constructing mine mouth plants in the western coal fields. [Grahl Tr. IV: p. 42]

(b) The Corps of Engineers is studying the possibility of adding an additional 1,000,000 kilowatts of speaking capacity to the existing dams on the Missouri River. [DX 24, pp. 13-14; Muller Dep. GX 204C; pp. 50-51] This study is in the preliminary stages only. [DX 24, pp. 13-14; Muller Dep. GX 204C: p. 51] The addition of peaking capacity by the Corps of Engineers is not considered an economically feasible power resource by the participants in the North Central Power Study, because the estimated cost of $330/kw is too high. The cost must be reduced to approximately $200/kw before such capacity could be considered economical. [DX 24, pp. 13-14; Grahl Tr. IV: pp. 13-14; 64-65; Hartl Tr. VIII: pp. 61-63]

B. *The Continuous Growth of Otter Tail Offsets Its Prospective Loss of Some Retail Loads.*

213. Otter Tail has succeeded in persuading several towns to abandon a municipal electric system in favor of receiving retail service from Otter Tail.

(a) It is the corporate policy of Otter Tail to acquire municipal electric systems in its service area and thereafter provide retail service to the towns whenever it is economical to do so. [Hartl Dep. GX 287; Hartl Tr. VIII: pp. 84-85] Otter Tail initiates the discussions with municipal electric systems in attempts to acquire their facilities and to obtain franchises to serve the towns at retail and has made offers to acquire such systems. [Hartl Dep. GX 287: p. 124; Hartl Tr. VIII: pp. 84-85].

(b) Since 1947, Otter Tail has acquired six municipal electric systems in its service area and thereafter Otter Tail served the six towns at retail. [GX 2, Interrogatory 3].

i. Fergus Falls, Minnesota was one of the towns. [GX 2, Interrogatory 3]. In terms of revenue received, Fergus Falls is the largest town presently served at retail by Otter Tail. [DX 95, schedule 5]. Prior to 1953 Otter Tail supplied power at wholesale to the municipal electric system in Fergus Falls. In 1953 the Bureau began to market power in the area. Otter Tail, which was and is headquartered in Fergus Falls, no longer wanted to have its headquarters in a town which it did not serve at retail. Accordingly, Otter Tail agreed to keep its general office and headquarters in Fergus Falls on condition that the City sell its municipal electric system to Otter Tail. The sale was completed on May 1, 1953. [Hartl Depo. GX 287: pp. 128-130].

214. The total Otter Tail existing electric load grows by approximately 7 percent per year through more intensive use of electric power by existing customers. [GX 445; Hartl Tr. VIII: pp. 80-84].

215. The Otter Tail load has also grown through the addition of new industrial and commercial customers. In 1972 Otter Tail will commence to supply power to a pipeline pumping station which is being constructed in its service area. The addition of this load will increase Otter Tail's present total electric load by 25 percent. [GX 445; Hartl Tr. VIII: pp. 80-84].

216. Otter Tail will have an opportunity to sell additional amounts of power to the 17 municipal systems to which it

presently wheels Bureau power because the Bureau is unlikely to be able to meet the load growth of these municipalities beyond 1977.

217. There will be no substantial impairment of Otter Tail's credit if the company is compelled to provide service to municipal electric systems.

(a) Otter Tail's present bond rating from Moody's is Baa. This has consistently been Otter Tail's rating since Moody's first began to rate Otter Tail's securities. [Hartl Tr. VIII: p. 84].

(b) If Otter Tail is compelled to sell power at wholesale or wheel power to municipal electric systems in towns it formerly served at retail, there will be little, if any, impairment of Otter Tail's credit. Otter Tail's bond rating would probably remain the same, because Moody's does not usually rate utility bonds below Baa. [Morton Tr. X: p. 73]. Otter Tail's bond rating was not affected when Otter Tail lost the retail service in the three towns of Elbow Lake, Minnesota, Colman, and Aurora, South Dakota. [Morton Tr. X: p. 71]. The investment market judges and purchases the securities of a company on the basis of the company's past earning power and its future earnings prospects. [Morton Tr. X: pp. 44-45]. It is improbable that very many of the towns served at retail by Otter Tail will establish municipal electric systems. Otter Tail's overall electric revenues are projected to grow substantially. [GX 445; Hartl Tr. VIII: pp. 80-84]. Otter Tail has consistently earned a reasonable rate of profit. Its rate of profit compares favorably with that earned by other electric utilities in the United States. [DX 97; Morton Tr. X: pp. 59-60]. Many of the other utilities whose rate of profit is comparable with that of Otter Tail

sell power at wholesale to municipal electric systems. [GX 425].

C. *There Is No Engineering Reason Which Precludes Otter Tail from Wheeling or Selling Power at Wholesale to Municipal Electric Systems.*

218. Otter Tail never claimed engineering infeasibility as a reason for not wheeling or selling at wholesale to Hankinson and Elbow Lake.

219. There is no engineering reason why Otter Tail cannot wheel or sell at wholesale to a town which it serves at retail. The same amount of power is needed by the town irrespective of whether Otter Tail serves it at retail or at wholesale. The same transmission facilities are neded whether Otter Tail sells at retail, at wholesale, or wheels the power from an outside source of supply. [Nye Dep. GX 288, p. 79; Trommershausen Tr. VI, pp. 83, 84].

IX. THE RESTRICTIVE PROVISIONS CONTAINED IN OTTER TAIL'S CONTRACTS WITH THE BUREAU OF RECLAMATION AND RURAL ELECTRIC COOPERATIVES ARE NOT IMMUNE FROM ANTITRUST ATTACK

A. *The Bureau of Reclamation*

220. The Bureau's general practice is to prepare drafts of transmission contracts with power suppliers which do not contain restrictions on the type or number of Bureau customers to be served over the transmission system of the other power supplier. [Muller Dep. GX 204A: pp. 102-103, 113]. This approach is based on the policy of the Bureau to make power available to as many preference customers as possible.

[Muller Dep. GX 204A: p. 103]. The Bureau recently refused to enter into a wheeling contract with Minnesota Power & Light Company because the company insisted on a provision limiting the types of customers to be served. [Muller Dep. GX 204A: pp. 108-110].

221. The Bureau has agreed to enter into some transmission contracts which have contained restrictions on the type or number of Bureau customers to be served over the transmission system of the other supplier. These contracts have been the result of a bargaining process in which the power supplier insisted that such provisions be included in the contract. [Muller Dept. GX 204A: pp. 103-105]. The Bureau has accepted such restrictive provisions in some contract because the Bureau had no alternative but to give up prospective service to future preference customers in order to obtain a means of delivery of power to those existing preference customers the power supplier was willing to serve. [Muller 204A: pp. 103-105].

222. The restrictive provision in the Otter Tail contract with the Bureau was inserted at the behest of Otter Tail.

(a) Otter Tail and the Bureau commenced negotiations of a wheeling contract in 1948. [Hartl Tr. VIII: pp. 16-17]. The initial wheeling contract entered into by Otter Tail and the Bureau was dated March 14, 1950. [GX 66]. The 1950 Otter Tail-Bureau contract did not contain a restriction on the preference customers to which Otter Tail would wheel power from the Bureau. It specifically provided that the Bureau could transmit power over Otter Tail's transmission system to customers entitled to preference under governing law. [GX 66, Section 17c; Hartl Tr. VIII: pp. 6-7].

(b) Otter Tail and the Bureau amended the 1950 contract, effective on June 14, 1955, so as to substantially

change the contract terms. The revised contract contains a provision which Otter Tail interprets to means that it has no obligation to wheel power from the Bureau to any municipality which received retail service from Otter Tail as of the date of the contract, namely June 14, 1955. [GX 67, section 27c; Hartl Tr. VII: pp. 16, 17]. This provision was the subject of prolonged negotiations over several years between the Bureau and Otter Tail. [Hartl Tr. VII; pp. 16-18]. This provision affords Otter Tail a means of protecting its existing retail customers. [Hartl Tr. VIII: pp. 20-22]. There is no engineering justification for the provision.

i. Otter Tail insisted that such a provision be included in the contract. The Bureau finally acceded to the inclusion of the provision because it was the most practical arrangement the Bureau could make at the time to deliver power to the existing preference customers. [Muller Dep. GX 204A: pp. 114, 115; Hartl Tr. VIII: pp. 22, 23].

ii. The Bureau interprets this provision to mean that Otter Tail must evaluate each request by the Bureau for wheeling service in light of the facts and circumstances existing at the time the request is made. [GX 254; GX 264].

223. Otter Tail derives substantial benefits from its contractual relationship with the Bureau, including the use by Otter Tail of the Bureau's transmission system to transmit power to Otter Tail's customers, the purchase of economy energy and other types of low cost electric power and energy from the Bureau, and greater reliability of service through the use of Bureau facilities in emergencies. [Hartl Tr. VII, pp. 12-13; Muller Dep. GX 204A, pp. 119-120].

B. *The Rural Electric Cooperatives*

224. The Otter Tail transmission agreements with several rural electric cooperatives contain provisions which prohibit the use of the Otter Tail transmission system by the cooperative to supply power to a customer served by Otter Tail and extend the same prohibition with respect to customers served by the cooperative. [GX 22; GX 38; GX 39; GX 65].

225. Otter Tail has transmission agreements with several rural electric cooperatives which contain no such restrictive provision. [GX 40; GX 41-47; GX 48-55; GX 57].

226. The Upper Mississippi Valley Power Pool has several rural electric cooperatives as members, provides for joint use of transmission facilities of the participants and contains no explicit restrictions prohibiting the use of the facilities to provide service by members to customers already served by another member. [GX 23-37].

PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW

I. The Court has jurisdiction over the subject matter of, and the parties to, this action.

II. The relevant product market within the meaning of Section 2 of the Sherman Act in which to determine whether Otter Tail possesses monopoly power is the retail distribution of electric power.

III. The relevant geographic markets within the meaning of Section 2 of the Sherman Act in which to determine whether Otter Tail possesses monopoly power are:

A. The Otter Tail service area generally.

B. Each town served at retail by Otter Tail.

IV. Otter Tail has illegally attempted to monopolize and has monopolized the interstate trade and commerce in the re-

tail distribution of electric power in municipalities it serves at retail and in its service area generally in violation of Section 2 of the Sherman Act by engaging in actions which have the purpose and effect of delaying or preventing establishment of municipal electric power systems, including, but not limited to:

A. refusals to sell power at wholesale to proposed municipal electric power systems located in municipalities in which it distributes electric power at retail;

B. refusals to wheel power to proposed municipal electric power systems located in towns in which it distributes electric power at retail;

C. litigation against municipalities which have voted to establish municipal electric power systems; and

D. invocation by Otter Tail of provisions in contracts with the Bureau of Reclamation and various rural electric cooperatives which Otter Tail interprets to prohibit the use of its transmission lines to transmit power from other power suppliers to proposed municipal electric power systems in towns in which it distributes electric power at retail.

V. The restrictive provisions contained in the Otter Tail transmission agreements with the Bureau of Reclamation and rural electric cooperatives are subject to the application of the antitrust laws.

Dated: October 22, 1971.

EDWARD J. DEVITT
Chief Judge
United States District Court

APPENDIX C

ORIGINAL JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

Civil Action No. 6-69-Civ.-139

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OTTER TAIL POWER COMPANY,

Defendant.

JUDGMENT

This case having come on to be heard, trial having been had and the Court having considered the evidence and briefs, and having issued a Memorandum and Order dated September 9, 1971, it is hereby

ORDERED, ADJUDGED, and DECREED that:

I.

This Court has jurisdiction of the subject matter of the action and the parties hereto under Section 4 of the Act of Congress of July 2, 1890, as amended, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (15 U.S.C. §4), commonly known as the Sherman Act.

II.

Defendant has attempted to monopolize and has monopolized interstate trade and commerce in the retail distribution of

electric power in cities and towns located in its service area, in violation of Section 2 of the Sherman Act.

III.

The provisions of this Judgment applicable to the Defendant shall also apply to each of its officers, directors, agents and employees and to each of its subsidiaries, successors and assigns, and all persons, firms and corporations acting in its behalf or under its direction and control, and to all other persons in active concert or participation with any of them who receive actual notice of this Judgment by personal service or otherwise.

IV.

Defendant is enjoined and restrained from:

(A) Refusing to sell electric power at wholesale to existing or proposed municipal electric power systems in cities and towns located in any area serviced by Defendant;

(B) Refusing to wheel (transmit) electric power over its transmission lines from other electric power suppliers to existing or proposed municipal electric power systems in cities and towns located in any area serviced by Defendant;

(C) Instituting, supporting or engaging in litigation, directly or indirectly, against cities and towns, and officials thereof, which have voted to establish municipal electric power systems, for the purpose of delaying, preventing, or interfering with establishment of a municipal electric power system;

(D) Entering into, enforcing or claiming any rights under any contract, agreement or understanding which prohibits the use of Otter Tail's transmission lines to wheel (transmit) electric power from other electric power suppliers to existing or proposed municipal electric power systems;

(E) Entering into, enforcing, or claiming any rights under any contract, agreement or understanding which limits, allo-

cates, restricts, divides or assigns the customers to whom, or the markets or territories in which, defendant or any other electric power supplier may sell electric power.

V.

For the purpose of determining or securing compliance with this Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division given to defendant at its principal office, be permitted, subject to any legally recognized privilege:

(A) Access during the office hours of defendant to all contracts, agreements, correspondence, memoranda, and other business records and documents in the possession or control of defendant relating to any of the matters contained in this Judgment; and

(B) Subject to the reasonable convenience of defendant and without restraint or interference from it, to interview the officers and employees of defendant, who may have counsel present, regarding any such matters.

Upon such written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, defendant shall submit written reports relating to any of the matters contained in this Judgment as may be requested.

No information obtained by the means provided in this Section V shall be divulged by any representatives of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Judgment, or as otherwise required by law.

VI.

Jurisdiction is retained for the purpose of enabling any of the parties to this Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

Dated: October 22, 1971.

EDWARD J. DEVITT
United States District Judge

Filed in Clerk's office Oct. 22, 1971.

APPENDIX D

ORDER OF THE DISTRICT COURT RULING ON MOTIONS FOR A NEW TRIAL, AMENDED FINDINGS, CONCLUSIONS AND AMENDED JUDGMENT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

Civil Action No. 6-69-139

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OTTER TAIL POWER COMPANY,

Defendant.

ORDER

The above matter came on to be heard before the Honorable Edward J. Devitt, Chief Judge of the above Court, on the 8th day of November, 1971, on the Alternative Motions made by the defendant for a new trial or for amended and/or additional Findings of Fact and for amended and/or additional Conclusions of Law, and to amend the Judgment accordingly. Kenneth C. Anderson appeared as attorney for the plaintiff, and Cyrus A. Field and David F. Lundeen appeared as attorneys for the defendant. The Court having reviewed the Briefs submitted and heard arguments of counsel, now makes the following Order:

IT IS HEREBY ORDERED, that the said Motions made by the defendant be, and each of same, are hereby denied, except that the Judgment shall be amended as hereinafter provided.

IT IS FURTHER ORDERED, that the Judgment entered and filed herein on October 22, 1971, be amended by inserting one new paragraph to read as follows:

"V.

"The defendant shall not be compelled by the Judgment in this case to furnish wholesale electric service or wheeling service to a municipality except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission."

The above additional paragraph shall be inserted after the present paragraph IV, and bear the number V as above stated, and the succeeding paragraphs shall then be changed accordingly and bear the respective numbers VI and VII.

An Amended Judgment shall be entered accordingly.

Dated November 10, 1971.

By the Court,
EDWARD J. DEVITT
Chief Judge
United States Distfict Court
District of Minnesota

Filed in Clerk's office Nov. 10, 1971.

APPENDIX E

AMENDED JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

Civil Action No. 6-69-Civ.-139

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OTTER TAIL POWER COMPANY,

Defendant.

AMENDED JUDGMENT

This case having come on to be heard, trial having been had and the Court having considered the evidence and briefs and having issued a Memorandum and Order dated September 9, 1971, and the Court having issued an Order Amending the Judgment as herein provided, it is hereby

ORDERED, ADJUDGED, and DECREED that:

I.

This Court has jurisdiction of the subject matter of the action and the parties hereto under Section 4 of the Act of Congress of July 2, 1890, as amended, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (15 U.S.C. Sec. 4), commonly known as the Sherman Act.

II.

Defendant has attempted to monopolize and has monopolized interstate trade and commerce in the retail distribution of

electric power in cities and towns located in its service area, in violation of Section 2 of the Sherman Act.

III.

The provisions of this Judgment applicable to the Defendant shall also apply to each of its officers, directors, agents and employees and to each of its subsidiaries, successors and assigns, and all persons, firms and corporations acting in its behalf or under its direction and control, and to all other persons in active concert or participation with any of them who receive actual notice of this Judgment by personal service or otherwise.

IV.

Defendant is enjoined and restrained from:

(A) Refusing to sell electric power at wholesale to existing or proposed municipal electric power systems in cities and towns located in any area serviced by Defendant;

(B) Refusing to wheel (transmit) electric power over its transmission lines from other electric power suppliers to existing or proposed municipal electric power systems in cities and towns located in any area serviced by Defendant;

(C) Instituting, supporting or engaging in litigation, directly or indirectly, against cities and towns, and officials thereof, which have voted to establish municipal electric power systems, for the purpose of delaying, preventing, or interfering with establishment of a municipal electric power system;

(D) Entering into, enforcing or claiming any rights under any contract, agreement or understanding which prohibits the use of Otter Tail's transmission lines to wheel (transmit) electric power from other electric power suppliers to existing or proposed municipal electric power systems;

(E) Entering into, enforcing, or claiming any rights under any contract, agreement or understanding which limits, allo-

cates, restricts, divides or assigns the customers to whom, or the markets or territories in which, defendant or any other electric power supplier may sell electric power.

V.

The Defendant shall not be compelled by the Judgment in this case to furnish wholesale electric service or wheeling service to a municipality except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission.

VI.

For the purpose of determining or securing compliance with this Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division given to defendant at its principal office, be permitted, subject to any legally recognized privilege:

(A) Access during the office hours of defendant to all contracts, agreements, correspondence, memoranda, and other business records and documents in the possession or control of defendant relating to any of the matters contained in this Judgment; and

(B) Subject to the reasonable convenience of defendant and without restraint or interference from it, to interview the officers and employees of defendant, who may have counsel present, regarding any such matters.

Upon such written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, defendant shall submit written reports relating to any of the matters contained in this Judgment as may be requested.

No information obtained by the means provided in this Section VI shall be divulged by any representatives of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Judgment, or as otherwise required by law.

VII.

Jurisdiction is retained for the purpose of enabling any of the parties to this Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

Dated November 10, 1971.

EDWARD J. DEVITT
United States District Judge

Filed in Clerk's office Nov. 10, 1971.

APPENDIX F

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

Civil Action No. 6-69-139

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

OTTER TAIL POWER COMPANY, *Defendant*.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given, that Otter Tail Power Company, the defendant above named, hereby appeals to the Supreme Court of the United States from the Amended Judgment entered in this action on November 10, 1971.

This appeal is taken pursuant to 15 U.S.C.A. § 29.

Dated: December 7, 1971.

CYRUS A. FIELD
DAVID F. LUNDEEN
Fergus Falls Nat. Bank Bldg.
Fergus Falls, Minnesota 56537
MILTON HANDLER
MICHAEL D. BLECHMAN
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
Atty. for Otter Tail Power Co.

Filed in the
U.S. District Court
for the District of
Minnesota on
December 7, 1971.

PROOF OF SERVICE

I, CYRUS A. FIELD, one of the attorneys for Otter Tail Power Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 7th day of December, 1971, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States, as follows:

On the United States of America, the appellee, by mailing two copies thereof in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, United States Department of Justice, Washington, D. C. 20530; and by mailing two copies thereof, in a duly addressed envelope, with air mail postage prepaid, to Richard W. McLaren, Assistant Attorney General, Antitrust Division, United States Department of Justice, Washington, D. C. 20530.

All parties required to be served have been served.

CYRUS A. FIELD
Fergus Falls Nat. Bank Bldg.
Fergus Falls, Minnesota 56537
Atty. for Otter Tail Power Co.

APPENDIX G

FEDERAL POWER COMMISSION OPINION NO. 551
(Short-Term Interconnection)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION
OPINION NO. 551

DOCKET NO. E-7278

VILLAGE OF ELBOW LAKE, MINNESOTA
v.
OTTER TAIL POWER COMPANY

Opinion and Order Directing Physical
Interconnection of Facilities
(Issued November 6, 1968)

Appearances:

I. L. Swanson for the Village of Elbow Lake, Minnesota.

Cyrus A. Field and David F. Lundeen for the Otter Tail Power Company.

Wallace Edward Brand for the Staff of the Federal Power Commission.

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Carl E. Bagge and John A. Carver, Jr.

CARVER, *Commissioner:*

This proceeding was formally commenced on March 16, 1966, with an application by the Village of Elbow Lake, Min-

nesota (Elbow Lake). An amended application was filed May 29, 1967 which stated that Elbow Lake has an operating municipal electric utility, that it has requested Otter Tail Power Company (Otter Tail) to provide wholesale electric service to Elbow Lake, and requested Otter Tail to provide wheeling service over its transmission lines to Elbow Lake. Elbow Lake alleged that it has two sources of power—the Bureau of Reclamation and Basin Electric Power Cooperative of Bismarck, North Dakota—but no means of bringing the power to Elbow Lake without Otter Tail's assistance, and that Otter Tail has refused to provide either wheeling or wholesale service. The amended application asks that Otter Tail be ordered to provide wheeling service, "and for such other and further relief as may be just in the premises."

Otter Tail filed its answer to the original application on April 20, 1966, and its amended answer May 20, 1966. Otter Tail's answer to the amended application was filed August 3, 1967, requesting dismissal of the application. That answer stated, *inter alia*, that Elbow Lake's amended application was not served on Otter Tail or its attorneys as required by Rule 1.17(b) of the Commission's Rules of Practice and Procedure, and that Otter Tail appeared specially and objected to the jurisdiction of the Commission on the following grounds: the application did not state the applicable statutory provisions as required by Rule 1.6(b)(2); Elbow Lake, a municipal corporation, is not a "person" within the meaning of the Federal Power Act; at the time of filing the original application Elbow Lake was not engaged in the transmission or sale of electric energy as required by the Act, although it has since become so engaged. Otter Tail further alleged that should the Commission grant the requested relief, it would amount to a sub-

sidy for the support of Elbow Lake's system, thereby depriving Otter Tail of the use of its property to serve its own customers, without due process of law; that this subsidy, which would aid a competitor, would in part destroy the facilities of Otter Tail, thereby constituting a taking of property without due process of law and without just compensation in violation of the Fifth Amendment.

Otter Tail also contended that to grant the requested relief would compel enlargement of its facilities (in proportion to the amount of power required to be sold Elbow Lake), impair its ability to render service to its existing customers, amount to an undue burden and not be in the public interest. Otter Tail stated that it has not held itself out generally to furnish wholesale service or wheeling service; that the Bureau of Reclamation contract with Otter Tail, paragraphs 26.(f) and 27.(c)(2), prohibits Otter Tail rendering wheeling service to Elbow Lake.

On February 5, 1968, Elbow Lake filed two letters. One requested that no action be taken "for the present" in the pending proceeding, and further requested a Commission staff analysis of power supply arrangements for Elbow Lake.[1] In the second letter, Elbow Lake asked for prompt interconnection with Otter Tail's Elbow Lake substation under Section 202(c) of the Act, stating that Elbow Lake has two 1136 kilowatt generators, peak loads are fast outstripping the capacity of the individual generators, and "at such time as our peak load exceeds the capacity of either generator our power will become non-firm." Elbow Lake also declared it was willing to pay for the interconnection facilities.

[1] The letter states that Elbow Lake seeks "* * * a coordination study of future power supply for the Village of Elbow Lake with other power systems in the area."

On February 19, 1968, Otter Tail answered both letters, disputing that Elbow Lake had shown any facts which would warrant an immediate connection with Otter Tail's facilities. Otter Tail further denied that an emergency exists and requested that a hearing be fixed on the matter.

Section 202(b) of the Act provides:

> Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers * * *.

Section 202(c) provides that during war and certain emergencies the Commission may order temporary interconnections without notice or hearing, on its own motion or on complaint.

On June 14, 1968, 39 FPC 970, the Commission ordered a hearing in this proceeding. The Examiner was directed to hear the issues on the appropriateness of an interim emergency interconnection under Section 202(c) in advance of the mat-

ters raised under Section 202(b) of the Act and to certificate to the Commission, without initial decision, that portion of the hearing record bearing on the issues presented under Section 202(c).

A hearing was held by Presiding Examiner Ames W. Williams in Fergus Falls, Minnesota, from July 9 through July 12, 1968. The Examiner ruled that the hearing would include the issues in both Sections 202(b) and 202(c) to the extent that counsel was prepared to do so, but, faced with the statement of staff counsel that the necessary studies which had been requested with respect to the Section 202(b) application have not been made, the Examiner indicated that "If you are not prepared to go ahead, why, we cannot do it, but I think we should take this opportunity to elicit all the testimony that we possibly can at this time." (Tr. 219-220)

Otter Tail in its brief to the Commission has taken the position that no interconnection should be ordered. Staff urges that temporary interconnection of Otter Tail's facilities with the municipal distribution system should be ordered, and that such an order would be proper either pursuant to Section 202(c) of the Act to meet an existing emergency or as an interim connection under Section 202(b) while studies are made and pending an ultimate determination after further hearings on the issues under Section 202(b). Both Otter Tail and staff have requested oral argument. Elbow Lake has not filed an independent brief but relies upon staff's presentation. Elbow Lake was represented by counsel at the hearing and participated by the introduction of evidence and cross-examination of Otter Tail's witnesses.

The Jurisdictional Questions

Under Section 202(b) of the Act, the Commission has jurisdiction to order an interconnection at the request of a State commission or a person, but only if the latter is engaged in the transmission or sale of electric energy. Otter Tail made the point in its answer to the amended application, but not in its brief, that Elbow Lake was not yet engaged in the transmission or sale of electric energy at the time of the filing of its original application. It is admitted, however, that Elbow Lake was engaged in transmission or sale at the time the amended application was filed. This meets the statutory requirements of Section 202(b).[2]

While service to the amended application was not made in the manner provided by our rule, Otter Tail did in fact receive the amended application and answered it, and participated in a hearing which the Examiner ruled dealt with issues not only under Section 202(c) but also under Section 202(b). Otter Tail presented evidence bearing on the issues under Section 202(b) without objecting to the Examiner's ruling, and contended before the Examiner and in its brief to the Commission that Section 202(b) issues should be heard and resolved. Under these circumstances objections to the form of service are no longer effective. Service of the amended application, moreover, is not required by the statute but by a provision of the Rules and Regulations of the Commission. The notice to Otter Tail required by the statute was fully complied with by the action of the Secretary when he mailed the amended application. Where substantive rights are not affected, the Commission may waive the requirements of its own Rules and Regulations.

[2] In case of an emergency the Commission may act under Section 202(c) without any application being filed.

Even assuming that those Rules were not adhered to, if no substantive rights are affected, as herein, the order setting the matter for hearing would constitute a waiver. Under circumstances such as these, to require a refiling and a new hearing would cause delay and expense, but would not affect the substantive issues to be decided.

Otter Tail's objection to the jurisdiction of the Commission on the ground that the amended application did not comply with the requirement of Rule 1.6(b)(2),[3] that the applicable statutory provisions be cited, is without merit. Failure to comply with this section of the Rules and Regulations may, in appropriate cases, be sufficient grounds for the rejection of the complaint, but cannot constitute an ouster of the jurisdiction of this Commission. There is no statutory requirement as to form of the application, and acceptance of the complaint would constitute a waiver of any defects due to the failure to comply with 1.6(b)(2) of the Rules.

The other procedural jurisdictional issue raised by Otter Tail in its amended answer but not urged in its brief can be handled summarily. It is generally recognized that the extent of the relief which the Commission can afford is limited by the provisions of Section 202(b). The Commission could not under that section[4] order sales of power to Elbow Lake without compensation. Nor could it order the interconnection if such order would compel enlargement of Otter Tail's gen-

[3] Section 1.6 of the Rules of Practice and Procedure was amended by Commission Order No. 359, issued February 5, 1968, 39 FPC 138, after the pleadings in question were filed.

[4] The Commission would have jurisdiction under Section 202(c) to order an emergency interconnection even under circumstances where it would have no power to order interconnection under Section 202(b).

erating facilities, or impair Otter Tail's ability to render adequate service to its customers. These limitations upon the power of the Commission do not affect its jurisdiction in the present proceeding to hear the issues and render appropriate relief, within its authority, based upon the facts presented.

The only argument made by Otter Tail in its brief with respect to the Commission's jurisdiction is that Elbow Lake is not a "person" entitled to the type of relief it has requested within the meaning of Section 202(b) of the Federal Power Act. It makes this argument with full realization of the Commission and judicial precedents holding that a municipality is a "person" entitled to relief under Section 202(b) of the Act. *Crisp County Power Commission v. Georgia Power Company*, Opinion No. 508, —— FPC —— (1966); *United States v. Public Utilities Commission of California*, 345 U.S. 295, 312-3, 316 (1953); *Shrewsbury Municipal Light Department v. New England Power Company*, 32 FPC 373 (1963), *aff'd sub nom. New England Power Co. v. Federal Power Commission*, 349 F. 2d 258 (CA1-1965). We adhere to these precedents.

Elbow Lake's Need for Interconnection With Otter Tail

Otter Tail serves retail customers in over 460 communities in Minnesota and the Dakotas. Fewer than 30 of these communities have a population of over 1500. Consumers in Elbow Lake, which has a population of about 1500, formerly were served at retail by Otter Tail under a franchise granted by Elbow Lake. The franchise expired in 1960 and was not renewed.

In 1966 Elbow Lake commenced to serve consumers within its boundaries through a municipally-owned distribution system powered by two diesel generators. One generator provides the power, while the other is on a standby basis in case the

first unit breaks down. Each of the two generators has a name plate rating of 1136 kw—with a factory guarantee of 10 percent overload—or 1250 kw for two hours. Based on past load peaks and anticipated growth it is expected by staff and Elbow Lake that the short demands of Elbow Lake will exceed the capacity of one generator in another year. Accordingly, they contend that Elbow Lake must buy another (smaller) generator or obtain an interconnection with Otter Tail in order to have adequate reserve power, since the remaining generator would not be able to handle the peak alone if one generator should fail. Otter Tail argues that the past peaks were abnormal and of very short duration so that the possibility of a generator breaking down at the time of such a peak is extremely small. Otter Tail also argues that the assured capacity of each of the generators exceeds the name plate rating and that one of them could, therefore, handle any peaks. The assured capacity is a matter of dispute. Otter Tail's contentions depend mainly on statements of a salesman of the generators which seem insufficient to rely upon. From the evidence presented, we conclude that there is a shortage of installed reserves in the municipal distribution system to meet an adequate standard of reliability for firm power supply.

The Scope of This Decision

In its brief Otter Tail contends that the Examiner heard all issues of the case and that the Commission should deal finally with these issues. Otter Tail would have the Commission find that no emergency exists within the meaning of 202(c), that an undue burden will be placed upon Otter Tail by the granting of any relief under 202(b) or 202(c), that it is not in the public interest to grant relief which would create a probability of a cascading effect of numerous other municipalities follow-

ing the precedent of Elbow Lake, and that Otter Tail has not dedicated its properties to wholesale sale or held itself out as a wholesaler. Additionally, Otter Tail would have the Commission find that it is improper to order it to wheel Bureau of Reclamation power to Elbow Lake because the Act does not allow the Commission to order Otter Tail to wheel government power, the Act does not allow the Commission to compel Otter Tail to transmit power for the benefit of a third party, and because Otter Tail's contract with the Bureau of Reclamation excludes any obligation to wheel power to municipalities served at retail by Otter Tail.

We think it clear that we cannot proceed at this time to a final determination of *all* the issues as requested by Otter Tail. It appears that the Examiner did proceed to hold a hearing to the extent counsel were ready to do so upon all the issues in the case. Otter Tail introduced evidence directed to showing that no interconnection with, or sale of energy to, Elbow Lake, or rendering of wholesale service to Elbow Lake should be ordered. Otter Tail contends that the record was complete. Staff counsel, however, as has been said, indicated that considerable additional time would be needed for studies to be made to determine whether lasting interconnection with Otter Tail was in the public interest or whether other possible interconnections later to be available would be preferable alternatives. We agree. Therefore, it will be necessary to remand this proceeding for further hearings on the unresolved issues to be held at such time and place as the Presiding Examiner or his successor in this proceeding may fix.

Section 202(b) of the Act allows this Commission to order an interconnection for the transmission or sale of energy when it is necessary or appropriate in the public interest, but only

where the Commission finds that no undue burden will be placed upon the utility subject to the order. As we have previously indicated, we are unable at this time to determine the public interest with regard to a long term interconnection since the record is incomplete on this point. However, we believe that Otter Tail should be required to interconnect for a limited time with Elbow Lake, until the studies and later hearings mentioned above have been completed, and supply to that municipality electric energy at such times as it has excess capacity on its own system.

Otter Tail's principal contention in its brief is that to require interconnection or wholesale sale of energy by it would place an undue burden upon Otter Tail. Otter Tail is an integrated system. Practically all of its sales are on a retail basis. The tiny amount of wholesale business still remaining is being eliminated. It does not wish to make sales at wholesale. If individual municipalities can set up their own plants and require Otter Tail to interconnect with them, and possibly to serve them at wholesale, Otter Tail expects and fears that other municipalities now served by it at retail will break away as Elbow Lake has done. Otter Tail's witnesses stated several small communities are watching the Elbow Lake experiment and will probably follow Elbow Lake's example if it is successful. Otter Tail urges that it places an undue burden upon it to require it to assist a competitor and create an example which may cause erosion of Otter Tail's business.

We find there is no undue burden upon Otter Tail. A careful reading of the Act leads us to the conclusion that the term "undue burden" as used therein refers to a physical burden upon the facilities and not to an economic burden upon the company. An economic burden may be subject to relief by the

imposition of charges sufficient to offset that burden. No substantial physical burden upon Otter Tail's electrical facilities has been shown or even claimed. This is not to say that the argument advanced by Otter Tail as to possible destruction of its retail business is without weight. These facts are quite relevant to whether it may be in the public interest to order a long-term interconnection between Otter Tail and Elbow Lake. The welfare of Otter Tail is a part of the public interest. No action should be taken which may adversely affect Otter Tail unless there are benefits to the public as a whole which would outweigh the effect on Otter Tail. But all these facts will be taken into account when a decision is ultimately made with respect to a long-term interconnection and source of power for Elbow Lake. We make no such determination here.

What payment is to be made by Elbow Lake to Otter Tail for the service here ordered will be left to negotiation between the parties, or, if they are unable to agree, for later determination by the Commission. The record is inadequate for a determination of this question at this time.

Otter Tail's brief also argues that Otter Tail has consistently and historically dedicated its properties to the furnishing of retail service and does not hold itself out generally to supply wholesale service. We believe this argument is not responsive to the request of Elbow Lake for relief under Section 202(b) of the Act. That section does not limit the authority of the Commission to order interconnections of facilities and interchange of power to systems which have dedicated their facilities in a particular manner or held themselves out as rendering a particular service.

We need not decide the questions raised by Otter Tail with respect to wheeling power, since no such wheeling is here

ordered. The studies still to be made may lead to the conclusion that Elbow Lake's long-term supply of power should be transmitted by someone other than Otter Tail. This would render moot the wheeling questions.

The connection here is ordered after notice and hearing pursuant to Section 202(b). It is, therefore, unnecessary for us to determine whether there exists an emergency within the meaning of Section 202(c).

This proceeding, we are told, will be closely followed as a possible precedent for future action by other municipalities. If other municipalities should desire to establish their own distribution systems, it is to be hoped that some of the present "Elbow Lake situation" may be avoided. Elbow Lake made known its intended separation from Otter Tail years ago, by its refusal to renew Otter Tail's franchise in 1960 and its approval of municipal bonds in 1962 to finance its own system. Not until 1968 did it request that a study be made to determine the best transmission and supply arrangements. After this proceeding was begun, Elbow Lake began generating and distributing its own power, and thereafter Otter Tail took out its retail distribution lines which Elbow Lake was compelled to duplicate. The parties thus drastically changed the situation during the pendency of this proceeding. It would have been far better for Elbow Lake to have requested a study and to have had that study completed before severing itself from Otter Tail. Means should also be found to avoid the establishment of inefficient small generating plants if interconnection with more efficient sources of energy is available in the not-too-distant future. If it should appear from the study in this proceeding that interconnection with another source of power will be available in two years, as has been

suggested, it might have been preferable for Elbow Lake to have deferred its own municipal system for that length of time. Means should certainly be found to avoid the economic waste of ripping out an existing distribution system and building a duplicate. The positions of the parties should not be changed during a pending proceeding if this can be avoided. All of these matters may be considered further in determining the public interest in this and other proceedings.

In view of the need for early decision on the present interconnection, the full briefing of the issues by Otter Tail and staff, and the limited nature of the decision here, the requests for oral argument are denied.

The Commission finds:

(1) It is necessary and appropirate for the purpose of the Federal Power Act that further public hearing be ordered respecting the issues presented under Section 202 of the Act and in the Application (as amended) and Answer.

(2) On and after December, 1967 there has existed a shortage of facilities for the generation and/or transmission of electric energy for supply of electric power in bulk to the distribution system owned and operated by the Village of Elbow Lake resulting from a shortage of installed reserves to meet an adequate standard of reliability for firm power supply and other uses.

(3) Establishing a short-term open interconnection subject to automatic closure between Otter Tail Power Company's power supply system and that of the Village of Elbow Lake for the supply of maintenance and emergency energy under an appropriate interconnection arrangement is in the public interest.

(4) The action here ordered is in the public interest.

(5) No undue burden will be imposed upon Otter Tail Power Company by the provisions of this order.

The Commission orders:

(A) Otter Tail Power Company's requests to dismiss the complaint of the Village of Elbow Lake are hereby denied.

(B) Otter Tail Power Company is hereby directed to permit establishment of an open interconnection subject to automatic closure between its bulk power supply system and that of the Village of Elbow Lake. The interconnection shall be operated for the supply of emergency (including maintenance) power and energy under terms and conditions to be agreed upon by the parties, or failing such agreement, as may hereafter be determined after hearing. The interconnection shall remain until this proceeding is terminated and no longer subject to judicial review and for one year thereafter unless the Commission shall otherwise order. The Village of Elbow Lake shall install, and pay for, the necessary facilities for interconnection, and bear the expense of maintenance thereof.

(C) During the period of said interconnection, Otter Tail Power Company shall prepare itself to deliver and shall deliver, to the Village of Elbow Lake within its capability to deliver and from power surplus to its own needs, such power and energy as the Village of Elbow Lake may require to meet shortages of power caused by outage of its own facilities in whole or in part, and the Village of Elbow Lake shall prepare itself to receive and shall receive such energy within its capability to do so as may be necessary to relieve a shortage of electric energy within said Village.

(D) Pursuant to the authority contained in the Federal Power Act, particularly Sections 202, 206, 308, 309 thereof, further public hearing shall be held upon the issues remaining

in this proceeding in accordance with this opinion; a prehearing conference to expedite that hearing to commence on a date and at a time to be fixed by the Presiding Examiner or his successor in this proceeding, in a hearing room of the Federal Power Commission, 441 G Street, NW., Washington, D.C. 20426.

(E) In order that the foregoing issues may be properly determined, Otter Tail Power Company is hereby directed pursuant to the provisions of Sections 301(b), 308 and 309 of the Federal Power Act, and the Village of Elbow Lake is hereby directed pursuant to the provisions of Sections 307(b), 308 and 309 of the Federal Power Act, to grant to authorized members of the staff of the Federal Power Commission during regular business hours, free access of its property and access to and the right to inspect and examine all of its accounts, records and memoranda and shall either furnish copies of such material at the request of the staff, or make such material available for reproduction by the Staff, and shall produce such material for use by the staff prior to and during said hearing at Offices of the Commission, 441 G Street, NW., Washington, D.C. 20426.

(F) Notices of intervention and petitions to intervene may be filed with the Federal Power Commission, Washington, D.C. 20426, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 1.8 and 1.37) on or before December 5, 1968.

(G) Oral argument is denied.

By the Commission.

(Seal)

GORDON M. GRANT
Secretary

APPENDIX H

FEDERAL POWER COMMISSION OPINION NO. 603 (LONG-TERM INTERCONNECTION)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION
OPINION NO. 603

Docket No. E-7278

VILLAGE OF ELBOW LAKE, MINNESOTA

vs.

OTTER TAIL POWER COMPANY

OPINION AND ORDER AUTHORIZING INTERCONNECTION OF FACILITIES

Issued: September 13, 1971

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; John A. Carver, Jr., Albert B. Brooke, Jr., and Pinkey Walker

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APPEARANCES

I. L. Swanson for Village of Elbow Lake, Minnesota

Cyrus A. Field and *David F. Lundeen* for Otter Tail Power Company

C. Emerson Duncan, II for Missouri Basin Municipal Agency

Watt N. Martin for the Staff of the Federal Power Commission

OPINION AND ORDER AUTHORIZING INTERCONNECTION OF FACILITIES

(Issued September 13, 1971)

CARVER, Commissioner:

1. Once again we turn to the interconnection dispute between the Village of Elbow Lake and the Otter Tail Power Company. The essential question now before us is whether a long-term interconnection between Elbow Lake and Otter Tail is in the public interest. We join the Examiner in believing that it is.

2. Elbow Lake is a Minnesota village with a population of about 1500. Otter Tail is an investor-owned public utility which serves about 460 small communities in Minnesota, North Dakota, and South Dakota. Elbow Lake was among Otter Tail's customers from 1913 until June of 1966, but in 1960 Otter Tail's franchise to serve Elbow Lake expired, and Elbow Lake

did not renew it. Instead, beginning in the early 1960's Elbow Lake sought without success to buy power at wholesale from Otter Tail. It also sought, equally without success, to buy from Otter Tail that portion of Otter Tail's distribution system that was located in Elbow Lake. In 1962, 77 percent of Elbow Lake's voters approved a bond issue looking toward a municipal power system, and that system, consisting of two small diesel generating units (each with a nameplate rating of 1136 KW, and a two-hour overload capability of 1250 KW), and a distribution system constructed by Elbow Lake (Otter Tail having removed its lines, at some loss to itself), began operations in June 1966.

3. In March 1966, even before its own system commenced operations, Elbow Lake turned to this Commission for help in meeting its bulk power supply problem. In letters filed in February 1968, Elbow Lake refined its request, and it then asked for an emergency interconnection with Otter Tail under section 202(c) of the Federal Power Act. Section 202(c) permits temporary interconnections during times of war or during certain emergencies. We ordered hearings, and thereafter, in our Opinion No. 551 of November 6, 1968 (40 FPC 1262), we ordered a short-term interconnection under section 202(b). In that opinion we found that Elbow Lake suffered from a shortage of installed reserves, and thus that its system failed to meet an adequate standard of reliability; we found it unnecessary to decide whether an emergency existed under section 202(c) of the Act, because we concluded that we were able to act under section 202(b); we ordered a short-term interconnection; and we ordered further hearings on the question of a long-term interconnection. Our action was affirmed by the Court of Appeals for the Eighth Circuit, *Otter Tail v.*

F.P.C., 429 F. 2d 232 (1970), cert. den. 401 U.S. 947 (1971). A subsequent dispute as to the details of the interconnection was resolved by the Initial Decision of Examiner Ames C. Williams on September 2, 1969, which decision we affirmed and adopted on December 5, 1969, 42 FPC 1082.

4. Hearings on the question of a long-term interconnection have proceeded. In his Initial Decision of January 14, 1971, on this question, Examiner Williams has concluded that a long-term interconnection should be ordered. Exceptions to that Decision have been filed by Otter Tail, by the Staff, and jointly by Elbow Lake and the intervenor, the Missouri Basin Municipal Power Agency. Otter Tail and the Staff have filed briefs opposing exceptions.

5. The Initial Decision affords to Elbow Lake three options. First, Elbow Lake could elect to take all of its requirements from Otter Tail, in which event Elbow Lake would be required to pay for the power at rates based upon Otter Tail's fully-allocated cost of firm, wholesale service. (Such rates the Examiner derived from Otter Tail's testimony as to its fully allocated cost, and no question was raised as to these rates on cross-examination.) Second, Elbow Lake could elect to take less than its full energy requirements from Otter Tail, in which event also, under the Examiner's Decision, Elbow Lake would pay at rates based upon Otter Tail's fully-allocated cost. Third, Elbow Lake would have, implicitly, the choice of not interconnecting, and of thus continuing its isolated operations.

6. We agree that an interconnection should be available to Elbow Lake, but we would prescribe somewhat different terms and conditions.

7. In so doing, we are mindful of two basic considerations that are present in this case, considerations which are not instantly reconcilable. On the one hand, it is entirely clear to us that the power consumers of Elbow Lake need help. The record shows that the demands placed upon the isolated Elbow Lake system have several times come within a few KW's of the maximum capacity of one of its two generators, thereby threatening Elbow Lake's firm power supply. In the face of this reality, we are compelled by section 202(b) of the Power Act to provide assistance, if an acceptable interconnection arrangement is available. An interconnection arrangement, meeting all of the tests of section 202(b), is here available. That is so because the record is clear that Otter Tail is capable of serving all of Elbow Lake's power needs without encountering any of the constraints set forth in section 202(b). Thus, if Otter Tail were to supply all of Elbow Lake's requirements, it would sustain no "undue burden" thereby; no "enlargement of generating facilities" would be required; and Otter Tail's "ability to render adequate service to its customers" would not be impaired. In these circumstances, we believe that the public interest indisputably requires an interconnection.

8. On the other hand, we cannot disagree with the Examiner's view that Elbow Lake has engaged in "an ill-advised excursion into the power business". Given the facts of record before us, it is plain that Elbow Lake's effort has not brought it the rewards it expected; indeed, its first year of operations, during which it perpetuated the rates formerly charged by Otter Tail, resulted in a financial loss. Unlike Otter Tail's earlier service to Elbow Lake, Elbow Lake's own system is of doubtful reliability, as evidenced by its presence before us now. And further, this record displays other evidences of

serious economic waste. Otter Tail, having refused to sell its distribution lines to Elbow Lake, thereupon ripped them out, and sustained a loss of revenue in their sale as salvage. Elbow Lake installed a duplicate distribution system. All who have been involved—Otter Tail, Elbow Lake, and the customers of each—have been the losers. While it is our responsibility to take all possible steps to insure to Elbow Lake's customers a high standard of service reliability, our terms and conditions must not invite improvident ventures elsewhere.

9. We also share the Examiner's view that Otter Tail is legitimately concerned about the possible erosion of its system. If other communities were to follow Elbow Lake's route, and if, having miscalculated the results, they could expect to be rescued by overly-generous interconnection terms, then Otter Tail's fears that it will lose its customers, seriatim, seem to us to be supported. We do not mean by this that we accept a captive market concept, however. The public interest is far broader than the economic interest of a particular power supplier. It is our legal responsibility, as the Supreme Court made clear in *Pennsylvania Water Co. v. F.P.C.*, 343 U.S. 414 (1952), to use our statutory authority to assure "an abundant supply of electric energy throughout the United States", and particularly to use our statutory power under section 202(b) to compel interconnection and coordination when the public interest requires it. The exercise of that authority may well require, as it does here, that we order a public utility to interconnect with an isolated municipal system. The private company's lack of enthusiasm for the arrangement cannot deter us, so long as the public interest requires it.

10. Clearly, any municipality contemplating an entry into the power business would be well-advised to review carefully the consequences of the actions taken by the parties now before us. Any such municipality should identify and study all of the alternatives and their probable consequences with patience and skill; and it should do so before new generators are bought, installed, and brought on the line. This Commission's opinion in the *Gainesville* case, 40 FPC 1227 (1968), recently affirmed by the Supreme Court, *Gainesville Utilities Department v. Florida Power Corporation*, —— U.S. —— (May 24, 1971), will be helpful in those circumstances. Municipalities, and private power suppliers as well, should take particular note of the following paragraph:

> As a general proposition we note that whenever two electric systems with generating capacity undertake to interconnect and operate in parallel it is necessary for them to consider the nature of their respective electrical resources and individual system utility responsibilities, both as a means of evaluating the particular services to be rendered between the connecting systems and in order to ensure that appropriate compensation is afforded, either through service exchanges or financial payments. Marked disparities between two (or more) systems in the reliance placed upon the network should be reflected in the terms and conditions of the interconnection arrangement through appropriate provisions. Each participant should bear its proportionate share of that responsibility. In our judgment, a prerequisite to viable and effective interconnected operations among all electric systems is an equitable sharing of the responsibilities of interconnected operation. Each participant should bear its proportionate

share of that responsibility. In doing so, each interconnecting system will meet its utility responsibilities and there will be no economic penalties for being the last one on the interconnected network. (At p. 1233.)

11. Our purpose, then, is to provide assistance to Elbow Lake's power consumers under section 202(b), for they clearly require assistance. But our purpose is also to provide that assistance under terms that are fair to Otter Tail and its customers. Whether other communities will engage in similar ventures are matters which they must decide, but we believe their decisions should be made with knowledge of the experiences of Elbow Lake and Otter Tail.

12. It is in light of these concerns that we here require that Otter Tail permit Elbow Lake to interconnect with Otter Tail's facilities. In our opinion, this record shows that a long-term interconnection between Otter Tail and Elbow Lake, with Elbow Lake taking its full requirements from Otter Tail, would result in Elbow Lake's receiving power at the lowest cost. Figures which are set forth below assist in illustrating this conclusion. The several alternatives proposed by Otter Tail and by the Missouri Basin Municipal Power Agency, and explored in the record, are either more expensive or legally unavailable. We agree with the Examiner that, as a matter of law, we cannot compel Otter Tail to wheel Bureau of Reclamation power to Elbow Lake. *City of Paris, Kentucky v. Kentucky Utilities Company*, 41 FPC 45 (1969).

13. The question, then, is on what terms a long-term interconnection should be ordered. The Examiner concluded that if Elbow Lake were to take its full requirements from Otter Tail, it should pay to Otter Tail a rate based upon Otter Tail's fully-

allocated cost for firm, wholesale service. In so concluding, the Examiner rejected a rate formula proposed by the Staff under which Elbow Lake would, first, pay capacity and energy charges which the Staff had derived from certain other Otter Tail service contracts (charges which the Examiner found would not recover Otter Tail's costs); and Elbow Lake would then, secondly, receive certain credits. The Staff's proposed credits were three: a "capacity credit" each month of 1/12 of Elbow Lake's annual payment of principal and interest on its existing generating plant; a credit relating to Elbow Lake's expenses in connection with installing interconnection facilities that exceed Otter Tail's usual requirements; and finally, a credit to compensate Elbow Lake for its actual costs for generating, if Otter Tail's service were interrupted, or if Otter Tail were to request Elbow Lake power.

14. We agree with the Examiner that the capacity and energy charges to be paid by Elbow Lake to Otter Tail should be based upon Otter Tail's fully-allocated cost. The capacity and energy charges proposed by the Staff were derived from other Otter Tail contracts which, because of the peculiarities surrounding their execution, cannot be accepted as a reasonable starting point here.

15. But we agree with the Staff that, on the basis of a full requirements arrangement, Elbow Lake should be given credit for its installed generating capacity. We are convinced that Otter Tail will, notwithstanding its strenuous arguments to the contrary, in fact derive benefits from the interconnection. Otter Tail argues that it is not interested in, and in fact opposed to, acquiring any more diesel capacity, and that the availability to it of Elbow Lake's diesels will constitute a

burden upon it, and not a help. We understand what Otter Tail is saying, but our judgment differs. Given Otter Tail's commitments to the Upper Mississippi Valley Power Pool, Otter Tail could, under a full requirements arrangement with Elbow Lake, gain readily demonstrable benefits, in addition to the obvious benefit of acquiring an additional firm customer to be served at demand and energy rates designed to provide a full rate of return. In reporting its loads to the power pool, Otter Tail would be required to add Elbow Lake's peak load, about 1271 KW's, to its own peak load. But in reporting its resources, it should be able to add Elbow Lake's 2500 KW, if the pool provisions are interpreted and applied in the same manner as they have been to Otter Tail's own generating resources. Inasmuch as Otter Tail is required to carry only 12 percent reserve capacity for power pool purposes, the gain in generating capacity to Otter Tail is both clear and considerable. We quite understand that small diesel units do not generally represent an economical method of producing power for large companies, but they do have a usefulness as standby units. We believe that usefulness must be recognized in the rate Elbow Lake would pay to Otter Tail.

16. We thus adopt the Examiner's full cost rate, along with the Staff's proposed capacity credit. In so doing, we believe that we do not run afoul of the proscription in section 202(b) against the forced enlargement of generating facilities. We are not requiring Otter Tail to buy Elbow Lake's machines; we are instead prescribing the "terms and conditions of the arrangement to be made between the persons affected by [the interconnection] order", as section 202(b) expressly permits us to do. One of the terms we here provide is the rate to be

paid, and for the reasons above stated, that rate should reflect Otter Tail's gain in generating capacity arising from the interconnection.

17. We do not adopt the second Staff proposed credit. We instead will require that if a long-term, full-requirements arrangement is made, and if Otter Tail insists upon a circuit breaker at the point of interconnection, Otter Tail must pay for the circuit breaker and maintain it. The record shows that Otter Tail does not usually require a circuit breaker if continuous service is offered. If Otter Tail requires one in this case, it should pay for it.

18. We do adopt the third proposed credit, to compensate Elbow Lake for its actual costs for generating if Otter Tail's service is interrupted, or if Otter Tail requests Elbow Lake power.

19. On the basis of the figures contained in or derived from the record, the foregoing long-term, full requirements arrangement would cost Elbow Lake $105,000 annually. That amount, because of the inclusion of the capacity credit, is less than Elbow Lake would pay under the Examiner's Decision. It is also less than Elbow Lake would pay if it were to refrain from interconnecting and instead bought a 500 KW peaking unit. It is more, by $12,000 per year, than Elbow Lake would pay under the Staff proposal, viz:

	Examiner's Decision, Full Requirements	Self Generation	Staff Method Per Record	Staff Method Using Full Cost Rate
Cost of Purchased Power	$ 89,000	$ 76,000[c]	$48,000[d]	$ 60,000[d]
Interconnection Cost	6,000	...	6,000	6,000
Standby Labor	...	...	10,000	10,000
Fixed Charge on Elbow Lake's Generating Units	29,000[a]	29,000	29,000	29,000
500 KW Peaking Unit	...	6,000[b]	...	...
Total costs to Elbow Lake	$124,000	$111,000	$93,000	$105,000

[a] Should be reduced by carrying charge on the salvage value of the generating units.

[b] Estimated by the Commission to be the carrying charges on a new KW unit costing $70,000.

[c] Operating costs.

[d] Net of capacity credit. Operating costs incurred by Elbow Lake would also be deducted, but would then have to be added separately so that totals would not change.

20. Because the foregoing full requirements arrangement seems to us the most satisfactory solution to Elbow Lake's bulk power supply needs, we think it unnecessary to provide to Elbow Lake the option of a partial requirements arrange-

ment.[1] We could not do so, in any event, on the basis of this record. The Examiner proposed that if Elbow Lake choses an interconnection on a partial requirements basis, then Elbow Lake would pay the same rates to Otter Tail as it would pay for full requirements service—i.e., rates based upon Otter Tail's fully-allocated cost for firm, wholesale service. Such a rate would, we believe, almost certainly be unreasonably and prohibitively high. More importantly, partial requirements service would not meet Elbow Lake's needs as fully as the full requirements service we have outlined. We thus do not provide for it here.

21. The third option, of continued isolated operation by Elbow Lake, requires no elaboration from us. Elbow Lake is, of course, free to adopt it, but we think it clear that it does not represent the wisest course, either from the point of view of economics or reliability of service.

22. Otter Tail has sought oral argument. We think it unnecessary, for the case has been very fully briefed.

The Commission further finds:

(1) On and after December 1967 there has existed a shortage of facilities for supplying electric power in bulk to the distribution system owned and operated by the Village of Elbow Lake. The results are a shortage of installed reserves and a failure of the system to meet an adequate standard of reliability for firm power supply and other uses.

(2) Otter Tail is a public utility within the meaning of Part II of the Federal Power Act.

(3) Elbow Lake is a "person" within the meaning of section 202(b) of the Federal Power Act.

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[1] The term "partial requirements" is used herein to mean any service other than full requirements service.

(4) It is necessary and appropriate for purposes of the Federal Power Act, particularly section 202(b) thereof, and it is in the public interest, that the Commission direct Otter Tail to permit physical connection of its transmission facilities with the facilities of Elbow Lake at a point on the Otter Tail 41.6 kv transmission line, approximately 1.4 miles directly east of the present location of Elbow Lake's generating plant, in order to permit Otter Tail to sell to and exchange energy with Elbow Lake upon the terms and conditions ordered below. Such sale and exchange of energy will not place any undue burden upon Otter Tail, nor require Otter Tail to enlarge its generating facilities for such purpose, nor impair its ability to render adequate service to its customers.

(5) Such physical connection should include the equipment necessary for a 2500 KVA interconnection. Unless otherwise provided by written agreement of Otter Tail and Elbow Lake, the facilities for such physical connection should conform substantially with the facilities described in Exhibit 29. The Village of Elbow Lake should install and pay for the facilities necessary for interconnection with the Otter Tail 41.6 kv transmission line.

(6) Elbow Lake should own and service the necessary facilities for interconnection and its termination facilities on the Otter Tail system. If Elbow Lake elects to take its full requirements from Otter Tail, Otter Tail may at its option install a circuit breaker at the 41.6 kv interconnection point. In that event, Otter Tail should pay for the installation and maintenance of such circuit breaker.

(7) Elbow Lake should construct the interconnection facilities within a reasonable time.

(8) Unless and until modified by law, if Elbow Lake elects to take its full energy requirements from Otter Tail, then the rate paid to Otter Tail should be based upon Otter Tail's fully-allocated cost of firm, wholesale service, less a credit to reflect the interest plus principal costs of Elbow Lake's generating plant, and less a further credit to reflect Elbow Lake's operation of its own units, if such operation is undertaken pursuant to Otter Tail's request, for which reasonable notice shall be required, or if it is required in the event that Otter Tail's service is interrupted. Elbow Lake should, at least once annually, and at its expense, demonstrate the capacity of its generators in the presence of Otter Tail's duly authorized representative.

The Commission orders:

(A) The Otter Tail Power Company shall permit the establishment of a physical connection of its transmission facilities with the facilities of Elbow Lake. Such physical connection shall be established on the transmission system of Otter Tail at a point on the Otter Tail 41.6 kv transmission line approximately 1.4 miles directly east of the present location of Elbow Lake's generating plant. Such physical connection shall include the equipment necessary for a 2,500 kva interconnection. Unless otherwise provided by written agreement of Otter Tail and Elbow Lake, the facilities for such physical connection shall conform substantially with the facilities described in Exhibit 29. The Village of Elbow Lake shall install and pay for the facilities necessary for interconnection with the Otter Tail 41.6 kv transmission line. Elbow Lake shall own and service the necessary facilities for interconnection and termination on the Otter Tail system.

(B) If Elbow Lake elects to take its full energy requirements from Otter Tail, the interconnection will be operated in a closed position and, at its option, Otter Tail may install a circuit breaker at the 41.6 kv interconnection point; and Otter Tail shall pay for the installation and maintenance of such circuit breaker, if it should be installed.

(C) If Elbow Lake elects to take its full energy requirements from Otter Tail, then the terms and conditions of the sale of electric energy following the effective date of the interconnection, and thereafter, shall be as follows, unless and until modified by a rate schedule filing completed in accordance with Part 35 of the Commission's Regulations under the Federal Power Act, or modified by Commission order:

(1) Capacity Charge: The capacity charge shall be $46.97 per year per kw of peak demand, to be billed in 12 equal monthly installments. "Peak demand" shall be the greatest rate at which energy is used by the load served by Elbow Lake during any interval of 15 consecutive minutes during the annual period ended with the June billing period preceding, plus a load growth factor of seven percent of such demand; provided that when Elbow Lake's actual peak demand exceeds or is less than the estimated value, appropriate settlements to reflect differences between the demand so estimated and the actual peak demand shall be made by July 15 of each year.

(2) Energy Charge: The energy charge shall be 0.6073 cent per kwh for all kwh per month.

(3) Capacity Credit: Otter Tail shall credit Elbow Lake's billing each month with one-twelfth of the annual interest plus principal costs of Elbow Lake's generating plant, for each month in which Elbow Lake's existing two

diesel generators are in operable condition. For any month in which either generator is not operable, the credit shall be multiplied by one-half the ratio of the sum of the days that each generator was operable to the total number of days in the month.

(4) Energy Credit: Upon reasonable notice, Otter Tail may request Elbow Lake to generate energy at a rate within the continuous (1136 KW) and two-hour overload (1250 kw) ratings of the diesel units. Elbow Lake may also generate energy if Otter Tail's service is interrupted. In either case, actual costs incurred by Elbow Lake will be deducted from its monthly bill during the month in which the expenses are incurred.

(5) Demonstration of Generating Capacity: Elbow Lake shall demonstrate the generating capacity of its generators within one month of the signing of the interconnection contract, in the presence of Otter Tail's duly authorized representative. If the demonstrated capacity differs from the 1136 kw continuous rating and the 1250 kw two-hour overload rating referred to in paragraph (4) hereof, then the capacity credit of paragraph (3) hereof shall be appropriately adjusted. The adjusted ratings shall remain in effect, with the adjusted capacity credit, until the next demonstration of capacity. Elbow Lake shall bear the cost of the first demonstration, and of annual demonstrations thereafter. Capacity demonstrations made more often than once a year shall be paid for by the party requesting such demonstration.

(D) Elbow Lake shall construct the interconnection facilities referred to herein within a reasonable time.

(E) Within 30 days from the date of issuance of this order, Otter Tail shall submit to the Commission for consideration a proposed rate schedule reflecting the terms and conditions of an interconnection for full requirements service to Elbow Lake, as set forth in this order.

(F) Otter Tail shall report to the Commission the date of commencement of service provided for herein, within 30 days following the commencement of such service.

(G) Because the interconnection and wholesale sale of energy ordered herein may be desired by Elbow Lake only until such time as it can obtain Bureau of Reclamation power, a notice of termination of at least 90 days by Elbow Lake to Otter Tail is hereby required.

(H) The Decision of the Presiding Examiner on January 14, 1971, is adopted as the decision of the Commission, to the extent not inconsistent herewith.

(I) Upon compliance by Otter Tail and Elbow Lake with the foregoing paragraphs of this order, this proceeding shall be terminated.

(J) All exceptions are denied.

(K) Oral argument is denied.

By the Commission.

(Seal)

KENNETH F. PLUMB
Secretary